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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

GILBERT GREEN and CALVIN JONES, Jr.

Petitioners,

v.

JOHN DILLARD,

v.

CHILTON COUNTY COMMISSION,
ROBERT M. MARTIN, PROBATE JUDGE

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Eleventh Circuit mistakenly apply the doctrine of standing and wrongly reverse the vacation of a Voting Rights injunction requiring a local government (i) to institute a racial classification for the chair position; (ii) to require an appointment to the chair position in place of the voters electing him; and (iii) to illegally increase the number of elected positions of the Commission?

2. Was the Eleventh Circuit wrong to reinstate such an injunction where neither its beneficiary nor the affected government sought to vacate it?

PARTIES TO THE PROCEEDING

Petitioners are Gilbert Green and Calvin Jones, Jr., intervenors in the district court. They were appellees before the Court of Appeals for the Eleventh Circuit in No. 06-14950.

Respondents are John Dillard, the original plaintiff and Robert R. Binion and John Wright, plaintiff-intervenors. They are collectively referred to as "Dillard." Dillard was the appellant in No. 06-14950.

Respondents also include the Chilton County, Alabama Commission, a defendant in Dillard's original action, and Chilton County's probate judge, Robert M. Martin, who was added as a defendant in 2003.

TABLE OF CONTENTS

Page
QUESTIONS PRESENTED.................. i

PARTIES TO THE PROCEEDINGS........... ii

APPENDIX............................ v

TABLE OF AUTHORITIES................. vi

OPINIONS BELOW....................... 1

STATEMENT OF JURISDICTION............ 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED............ 2

STATEMENT OF THE CASE............... 5

I. The 1988 Decree...................... 6

II. Proceedings Below................... 8

REASONS FOR GRANTING THE WRIT..... 11

I. Petitioners Have Article III Standing to End a District Court's Decree Barring Their Right to Vote for Chair of the Local Government.................... 12

A. Petitioners Do Not Seek Relief

TABLE OF CONTENTS–Continued

From a Mere Generalized Grievance 14

B. Petitioners Have Standing Because They Have Been Denied the Right to Vote for an Office on Account of Race 17

II. The Eleventh Circuit's Equitable Authority Did Not Include The Power to Reinstate the 1988 Decree Merely Because the Local Government It Created Was Not Opposed 19

A. The Ruling Below Conflicts With Seventh Circuit Precedent 21

B. There Is a Split in the Circuits on the Power of a Federal Court to Vacate its Injunction Without Regard for a Proper Motion from a Party 23

CONCLUSION.......................... 23

APPENDIX

Dillard v. Chilton County Commission, et al, (11th Cir. 2007) 1a-33a

Dillard v. Chilton County Commission, (M.D. Ala. 2006) 34a-50a

Pretrial Hearing Order dated March 8, 2004 . . . . 51a-71a

Answer of Chilton County Commission and Probate Judge Robert M. Martin 72a-78a

Complaint in Intervention filed February 21, 2003 . . . . .79a-96a

Consent Decree entered June 23, 1988 . . . . .97a-100a

Order of the Court of Appeals for the Eleventh Circuit Denying Petition for Rehearing or Rehearing *En Banc* dated November 28, 2007 . . . . .101a-104a

TABLE OF AUTHORITIES

CASES: PAGE

Alberti v. Klevenhagen, 46 F.3d 1347 (5th Cir. 1995) 23

ACORN v. Edgar, 56 F.3d 791 (7th Cir. 1995) 21, 22

Dr. Jose S. Belaval, Inc. v. Perez-Perdomo, 465 F. 3d 33 (1st Cir. 2006) 23

Bunton v. Patterson, 393 U.S. 544 (1969) 12

Chapman v. Meier, 420 U.S. 1 (1975) 20

*Daimler Chrysler Corp. v. Cuno,*126 S. Ct. 1854 (2006). 12

Dillard v. Baldwin County Bd. of Educ., 686 F.Supp. 1459 (M.D. Ala. 1988) 6

Dillard v. Baldwin County Comm'n, 222 F.Supp.2d. 1283 (M.D. Ala. 2002) 21

Dillard v. Baldwin County Comm'n, 225 F.3d 1271 (11th Cir. 2000). 10, 20

Dillard v. Crenshaw County, 640 F.Supp. 1347 (M.D. Ala. 1986) 6

Dillard v. Chilton County Comm'n, 447 F.Supp.2d 1273 (M.D. Ala. 2006) . . . .*passim*

Dillard v. Chilton County Comm'n, 495 F.3d
1324 (11th Cir. 2007). *passi*

Fairchild v. Hughes, 238 U.S. 126 (1922). 15

Fort Knox Music, Inc. v. Baptiste, 257 F. 3d
108 (2d Cir. 2001) 23

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 12

Holder v. Hall, 512 U.S. 874 (1994) 8, 20

Kingsvision Pay-Per-View, Ltd. v. Lake Alice Bar,
168 F. 3d 347 (9th Cir. 1999) 23

Lance v. Coffman, 127 S. Ct. 1194 (2008). . . *passim*
New York v. United States, 505 U.S.
144 (1992) 20, 21

*Parents Involved in Cmty. Schs. v. Seattle
Sch. Dist., No. 1.*, 127 S. Ct. 2738 (2007) 19

Printz v. United States, 521 U.S. 898 (1997) 20
Shaw v. Hunt, 517 U.S. 899 (1996) 12
Shaw v. Reno, 509 U.S. 630 (1993). 12, 18, 19
United States v. Jacobs, 298 F. 2d 469
(4th Cir. 1961) 23

United States v. Pauley, 321 F. 3d 578
(6th Cir. 2003) 23

Warth v. Seldin, 422 U.S. 490 (1975)....... 16, 17

White v. Alabama, 74 F. 3d 1058
(11th Cir. 1996) 22

Wilson v. Minor, 220 F. 3d. 1297
(11th Cir. 2000) 22

Wright v. Rockefeller, 376 U.S. 52 (1964)...... 18

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. III, § 2.................. *passim*

U.S. Const. amend. V........................ 7

U.S. Const. amend. XIV, § 1.............. *passim*

STATUTES:
42 U.S.C. § 1973 .... *passim*

RULE:
Fed. R. Civ. P. 60(b)(5)................ 23

PETITION FOR WRIT OF CERTIORARI

Petitioners Green and Jones (collectively "Petitioners") respectfully petition this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at *Green v. Chilton County Commission*, 495 F.3d 1324 (11th Cir. 2007), and is reprinted in the Appendix at App.1a-33a. The decision of the United States District Court for the Middle District of Alabama vacating the decree is reported at *Dillard v. Chilton County Commission*, 447 F.Supp.2d 1273 (M.D. Ala. 2006), and is reprinted in the Appendix at App. 34a-50a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its decision on August 20, 2007. App. 1a. On November 28, 2007, the Court of Appeals denied the Petitioners' timely request for rehearing and rehearing *en banc*. App. 101a-104a. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves interpretation of the following:

United States Constitution, Article III, sec. 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, sec. 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1973(a)

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.

Fed. R. Civ. P., Rule 60(b)(5)

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable.

STATEMENT OF THE CASE

This Petition presents issues of critical importance. The first is whether the Eleventh Circuit properly denied redress to Petitioners in their attempt to vacate a District Court's 1988 injunction that constituted the manner of choosing the governing officials for Chilton County, Alabama by ordering a racial quota, replacing an elected official with an appointed one, and creating three new elected positions in the local government without a finding or evidence of intentional discrimination in the creation or maintenance of the existing form of local government.

The second, equally critical issue directly affects the implementation of the Voting Rights Act: whether a court's equitable authority should include appointment of local officials required to be elected. Indeed, a variation on the same problem is now pending before this Court in *Riley v. Kennedy,* No. 07-77. Here though, the issue is the scope of the federal courts' authority and whether its equitable power requires a motion from a party to vacate such an illegal injunction.

I. The 1988 Decree

In 1985, Respondents filed suit challenging the election processes of nine Alabama counties alleging violations of section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments of the United States Constitution. In response to a United States District Court opinion finding these election systems "to be the product of, or tainted by, racially inspired enactments of the Alabama legislature," *Dillard v. Crenshaw County,* 640 F. Supp. 1347, 1357-1360 (M.D. Ala. 1986), Respondents amended their complaint to certify the Talladega Board of Education and the City of Childersburg as designated representatives of a proposed defendant class consisting of all political subdivisions of the state. *Dillard v. Chilton County Comm'n,* 447 F. Supp. 2d 1273, 1274 (M.D. Ala. 2006) (*citing Dillard v. Baldwin County Bd. of Educ.,* 686 F.Supp. 1459 (M.D. Ala. 1988).

In July 1987, the United States District Court for the Middle District of Alabama approved an Interim Consent Decree in order to avoid the burden and expense of further contested litigation and to promote speedy enforcement of the Voting Rights Act. *See Dillard v. Baldwin County Bd. of Educ.,* 686 F.Supp. at 1461. The Interim Consent Decree also designated the Talladega County Board of Education and the City of Childersburg as representatives of the defendant class and gave 183 defendant political subdivisions in the state the opportunity to select one of three options for resolving the case against it. *See Dillard v. Chilton County Comm'n,* 447 F.Supp.2d at 1274. The Chilton County Commission ("the Commission"), a member of the defendant class, selected Option B. *Id.*

Chilton County is located in central Alabama. In 1988, blacks comprised just 11.86% of the general population and lived throughout the county. From 1931 to 1988, a five-member commission governed Chilton County in accordance with the election system enacted by the Alabama legislature. *Id.* Under this system, the elected probate judge of the county served as chair and the remaining four members were elected first countywide, then by numbered posts wherein each voter was allowed to vote for only one candidate in each place. In order to run as the nominee of a political party in the general election, a candidate had to receive a majority of the votes in the primary election.

On March 9, 1988, Respondents and the Commission filed a joint motion for approval of a Consent Decree negotiated in response to the lawsuit.[1] The District Court granted said motion over the objection of several members of the plaintiff class on June 1, 1988. *Dillard,* 447 F.Supp.2d at 1274. The approved consent decree ("the 1988 Decree") expanded the number of seats on the Commission from four to seven, required that commissioners be elected at-large using cumulative voting rules, and removed the probate judge as chairman of the commission. In addition, the 1988 Decree established a new procedure for determining the chairman of the Commission. The 1988 Decree required that the Commission:

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[1] In accordance with the terms of Option B, the Commission did not contest the alleged violation of section 2 of the Voting Rights Act and proceeded immediately to the remedial phase of the litigation.

> "shall ensure that, if a black citizen is elected to the county commission, he or she shall be offered the opportunity to serve a term as chair of not less than [sic] six months duration during each four year terms of office. If more than one black citizen [was] elected to the commission, the proviso herein shall only require that one six month term as chair be guaranteed."

App. at 98a at ¶ 4.

II. The Proceedings Below

On February 21, 2003, Petitioners filed a Complaint-in-Intervention[2] alleging violations of both their constitutional and statutory rights. Specifically, Petitioners claimed that this Court's holding in *Holder v. Hall*, 512 U.S. 874 (1994), prohibited federal courts from mandating that a political subdivision alter the size of its elected bodies as a remedy under section 2 of the Voting Rights Act. App. at 79a-96a. Petitioners further claimed that the 1988 Consent Decree violated the Fifth and Fourteenth Amendments to the United States Constitution "to the extent it provides for commissioners to be offered the chair of [the]

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[2] Petitioners added the Probate Judge as a defendant. App. at 80a. The probate judge is responsible for the administration of local elections. App. at 82a.

Commission . . . on the basis of the race of the commissioner thereby imposing a racial quota on the governing body." App. at 91a at ¶ 28. Finally, Petitioners alleged that the decrees' change of the office of chairman from an elected position to an appointed one violated the Voting Rights Act. App. at 88a-89a at ¶ 19. To remedy these alleged violations, Petitioners requested the court vacate the 1988 Decree to the extent it altered the size of the Commission and imposed an unlawful racial quota.

The Commission and probate judge answered Petitioners' complaint-in-intervention jointly, admitting that the 1988 Decree should be vacated "because it exceeds the remedial authority set forth in the Voting Rights Act." App. at 75a at ¶ 16. The Commission also admitted that the 1988 Decree should be vacated on the grounds that it violated the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment. App. at 76a at ¶ 28.

Respondents did not answer Petitioners' complaint-in-intervention. Nevertheless, Respondents did attend the pretrial hearing to argue that Petitioners failed to state claims upon which relief could be granted under both the Voting Rights Act and Fourteenth Amendments, app. at 55a at ¶ 4 (a) (6), to challenge Petitioners' standing, app. at 54a at ¶ 4 (a) (14), and to allege that Petitioners' intervention was motivated by racial discrimination, app. at 56a at ¶ 4 (a) (11).

In its pretrial hearing submission, the Commission and probate judge focused solely on the proposed remedy, requesting that it provide that the Commission be composed of four members from single-member districts, with the Probate Judge serving as fifth member and chairman. *Id.* at ¶ 4 (c) (2). The Commission denied Respondents claim that it acted, or failed to act, for racially motivated reasons. App. at 67a at ¶ 4 (c) (4).

On August 14, 2006, the District Court sustained Petitioners' challenge and vacated the 1988 Decree on the grounds that the remedy contained in the decree was not authorized by section 2 of the Voting Rights Act. Indeed, the District Court noted that similar decrees had been vacated as "illegal election scheme[s] that [were] plainly created because of or on account of race." *See Dillard*, 447 F. Supp. 2d at 1278 (*citing Dillard v. Baldwin County Commissioners*, 225 F.3d at 1281). Presumably because it found adequate grounds upon which to grant Petitioners requested relief, the District Court did not address whether the 1988 Decree, to the extent it imposed a racial quota on the office of the chairman, violated the Equal Protection clause of the Fourteenth Amendment or whether the removal of the Probate Judge from the office of chairman was itself a violation of section 2 of the Voting Rights Act and/or the Fourteenth Amendment. It did, however, note that "there is no evidence to support the conclusion" that the pre-1988 Chilton County Commission election scheme was used for racially discriminatory reasons. *Dillard,* 447 F.Supp.2d at 1278.

Respondent Dillard appealed the decision of the District Court to the Court of Appeals for the Eleventh Circuit. The Court of Appeals took briefs and heard arguments on the matter pursuant to its jurisdiction under 28 U.S.C. 1291(a)(1).

On August 20, 2007, the Court of Appeals reversed the District Court's decision, holding that Petitioners lacked independent standing under *Lance v. Coffman*, 127 S. Ct. 1194 (2007), to assert their claims under the Voting Rights Act and the Fifth, Tenth, and Eleventh Amendments. The Court of Appeals did not address Petitioners' allegation that the removal of the Probate Judge as chairman violated section 2 of the Voting Rights Act and ruled they lacked standing to assert their alleged equal protection violations.

Petitioners timely filed a petition for rehearing *en banc* pursuant to Fed. R. App. P. 35 on September 7, 2007. On November 28, 2007, the Court of Appeals for the Eleventh Circuit denied the petition for rehearing *en banc*. App. at 101-104.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit should not have reversed the District Court's decision to vacate the 1988 injunction. Its grounds for the decision, that Petitioners did not have standing to contest the constitutional validity of the injunction, are not supported by this Court's precedent. Moreover, the decision reinstates an illegal racial quota for a position in local government, reinstates an appointed position in place of an elected position, and reinstates three judicially created positions in local government not provided by state law.

I. Petitioners Have Article III Standing to End the District Court's Decree Barring Their Right to Vote for Chair of the Local Government.

The issue presented in this petition deals with the "he" in the "he suffered" component of standing; i.e., whether the act complained of goes beyond a general grievance. Petitioners' injury is like that found in *Shaw v. Reno*, 509 U.S. 630, 641 (1993), and *Shaw v. Hunt*, 517 U.S. 899, 904 (1996), where citizens are treated as racial units, or in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), where they are systematically excluded from voting by gerrymander, or *Bunton v. Patterson*, 393 U.S. 544 (1969), where the office is changed from elected to appointive. Though this injury can be said to be suffered by a large number of persons, it is no less an injury cognizable under Article III. Thus, the injury is not a harm suffered "in common with people generally." *Lance v. Coffman*, 127 S.Ct. 1194, 1196 (2007) (*citing Daimler Chrysler Corp. v. Cuno*, 126 S.Ct. 1854, 1862 (2006)).

In finding to the contrary, the Eleventh Circuit did not fully consider the pleadings, and positions taken by Petitioners in the district court. For instance, the district court stated that Petitioners "argued that they individually suffered an actual injury as a result of the illegal election schemes plainly created because of, or on account of race." *See Dillard*, 447 F.Supp.2d at 1278. That claim of injury entitles Petitioners to be heard in an Article III court.

Petitioners complaint in intervention alleges the following injuries:

> "Petitioners are adversely affected by the increase in the number of members of the Commission, by the change of the method of electing county commissioners from the method established by the Alabama legislature to the cumulative voting system currently utilized under the Order of this Court entered in this case June 23, 1988, by the removal of the Probate Judge of Chilton County, Alabama from his position as chairman *ex officio* of the Commission, and by the imposition of a racial quota in the selection of the chairman of the Commission."

App. 81a at ¶ 6. In *addition*, Petitioners asserted a "federally protected interest in maintaining the democratically-established form of his county government." *Id.* These are precisely the types of claims this Court distinguished as cognizable in *Lance* because they are concrete and personalized injuries in the form of denials of equal treatment. *Dillard,* 495 F.3d at 1333 (*citing Lance,* 127 S.Ct. at 1198).

Count II of the Complaint-in-Intervention alleges that the 1988 Decree violates the Voting Rights Act because it reserves the office of chairman for a black member. App. at 88a at ¶ 19. In order secure an office to fulfill its racial quota, the 1988

Decree took from the voters of Chilton County the right to elect the chairman of the Commission and provided for the selection of the chairman by the Commissioners among their members *on the condition that they selected a black commissioner if one was available.* In still another count, Count V, Petitioners allege a violation of the Fourteenth Amendment based on the 1988 Decree's requirement that the Commission select a black commissioner to chair the commission if one is available. App. at 91a at ¶ 28. The District Court did not address these claims, presumably because it decided to vacate the injunction on other grounds. The Court of Appeals addressed whether Petitioners had standing to bring the claims in a footnote. *Dillard,* 495 F.3d at 1334-1335 n.8.

A. Petitioners Do Not Seek Relief From a Mere Generalized Grievance.

In determining that Petitioners did not have standing to assert their claims, the Eleventh Circuit relied entirely on this Court's holding in *Lance v. Coffman*, 127 S.Ct. 1194 (2007). This reliance was misplaced. Petitioners claims are distinguishable from *Lance* for two reasons: first, Petitioners claimed specific, personal injuries caused by a failure to follow the law, and; second, this Court has previously held that a plaintiff has standing to allege a violation of his constitutional rights where he is subject to a classification based solely on race. Additionally, Petitioners presented claims that the 1988 Decree was contrary to other precedent not related to Equal Protection. Regardless of whether the Eleventh Circuit properly refused relief on those claims, it was not justified in overlooking the race-based defects in the 1988 Decree.

In *Lance*, private citizens alleged that the Colorado Constitution violated the United States Constitution because it deprived the Colorado legislature of its responsibility to draw congressional districts. *Lance,* 127 S.Ct. at 1196. This Court dismissed the complaint for want of standing upon its finding that the only alleged injury, "that the law—specifically the Elections Clause—was not followed," constituted an "undifferentiated, generalized grievance." *Id.* In articulating its holding, this Court expressly distinguished the claim at issue where the "plaintiff sought to assert 'only the right possessed by every citizen, to require that the Government be administered according to law . . . ,'" *id.* at 1197 (*citing Fairchild v. Hughes*, 258 U.S. 126, 129 (1922), from cognizable claims brought by individual qualified voters subjected to an election process that deprives them of equal protection of the laws in violation of the Fourteenth Amendment. *Lance,* 127 S.Ct. at 1198.

The Eleventh Circuit described the *Lance* plaintiffs' interest as "citizen voters in the district that they allege should have been legislatively, rather than judicially drawn." *Dillard,* 495 F.3d at 1332 (emphasis in original). It then similarly characterized Petitioners' complaint, stating that "the [Petitioners] assert only the generalized incompatibility of the consent decree with the rights of all citizens in the county to be free of judicial interference," a form of injury that constituted "an undifferentiated harm suffered in common by all citizens of the county." *Id.* at 1333. While it is true that such claims are present, this statement overlooks alternative grounds on which the District Court's vacation of its 1988 Decree should have been affirmed and thereby fails to consider the full scope of the pleadings, and the separate counts of the Complaint-in-Intervention. Thus, the Eleventh Circuit mischaracterizes Petitioners' claims, disregards the facts of the case as plead in the complaint-in-intervention which is a crucial oversight because "although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and the source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (internal citations omitted).

In only two paragraphs of dicta, the Elevnth Circuit dismissed Petitioners' equal protection and Voting Rights Act claims, stating that the claim "merely raises the same allegations as elsewhere that the district court, by imposing unauthorized injunctive relief, exceeded its authority and violated legal rights held by the Commission members."[3]

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[3] While the Court of Appeals is correct that the Complaint alleges that the effect of the 1988 Decree is that it causes the Commission members to engage in conduct that violates the Equal Protection Clause, *see* App. at 91a at ¶ 28, the Court of Appeals is incorrect in its assumption that the conduct described in that paragraph is the only conduct which

Dillard, 495 F.3d at 1334 n.8 (emphasis in original). This interpretation is not supported by the record. Importantly, the Court of Appeals' statement that Petitioners lack standing to claim an equal protection violation because the invidious racial classification is a "generalized grievance shared by all voters in Chilton County," *id.,* is not supported by the law.

B. Petitioners Have Standing Because They Have Been Denied the Right to Vote for an Office on Account of Race.

In matters of equal protection, the right possessed by every citizen to be free of governmentally imposed racial classifications can be defended by a private citizen where that citizen is uniquely situated so as to be directly affected by that classification. The fact that Petitioners allege an injury that other voters in their district share does not alter this analysis. A plaintiff who alleges a distinct and palpable injury to himself may invoke the general public interest in support of his claim. *Warth,* 422 U.S. at 502 (internal citations omitted).

Petitioners in the instant case have standing to assert their Equal Protection claims because they are directly affected by the racial quota system. Petitioners are all registered voters in Chilton County. Through the exercise of their voting rights

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Petitioners allege violated the Equal Protection Clause. (See App. 81a-82a at ¶ 6 (alleging that Petitioners were adversely affected by, among others things, the imposition of a racial quota system).

before 1988, Petitioners selected the chair of the Commission by casting a vote for the probate judge candidate of their choice. The 1988 Decree deprives Petitioner of their right to vote for chairman of the Commission and replaces that procedure with a scheme that utilizes an illegal racial quota system. These direct, concrete personal injuries are sufficient grounds upon which to base Petitioners' standing.

Moreover, the effect of these personal injuries so egregiously harms the general public that Petitioners are entitled to raise the question of whether the consent decree is legal. *See Shaw v. Reno,* 509 U.S. at 641. Like the districts in *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964), the principles of equality are at war with the notion that the Commission must be chaired by a black commissioner if one is available. 376 U.S. at 66-67 (Douglas, J. dissenting). The benchmark for eligibility to sit as the chairman of the Commission should not rest with race because race has no bearing on an individual's qualification. As this Court stated in *Shaw*:

> Classifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility. Even in the pursuit of remedial objectives, an explicit policy of assignment by race

> may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs.

Shaw, 509 U.S. at 643 (internal citations omitted). *See also, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1,* 127 S. Ct. 2738, 2767 (2007). To allow such a benchmark to persist would undermine decades of this Court's jurisprudence highlighting and defending the most basic principle of humanity: it is the individual that is important, not his race.

II. The Eleventh Circuit's Equitable Authority Did Not Include The Power to Reinstate the 1988 Decree Merely Because the Local Government It Created Was Not Opposed.

The Eleventh Circuit decision to reinstate of the 1988 Decree leaves in place an injunction which is due to be set aside. Doing so under the banner of Article III standing doctrine is especially troublesome. Both the scope of the 1988 Decree and its impact on local government are features which the Eleventh Circuit should consider on its own. It need not wait for a party with standing to make a proper motion. It should not have left in place the illegal racial classification utilized to select the chair, or the provision for three additional persons to be elected. This Court has never sanctioned the use of a federal court's remedial power in equity to include the alteration of the total number of officials elected or racial classifications. The accepted remedy for vote dilution caused by the use of multi-member forms of governance is to provide for single member election districts. *See Chapman v. Meier*, 420 U.S. 1 (1975). Indeed, this Court decided previously that the authority of a federal court to fashion a remedy for vote dilution of racial groups does not include increasing the number of persons elected. *See Holder v. Hall*, 512 U.S. 874 (1994). Given that "an exercise of judicial power" is improper to change the number of persons elected, a court order doing exactly that even resembles an unauthorized commandeering of the local election process. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

Petitioners were allowed to intervene in 2003 without objection of the parties, except that Dillard denied that Petitioners had standing. Petitioners contended that the 1988 Decree was due to be vacated in light of *Holder v. Hall, supra*, and its Eleventh Circuit progeny: *White v. Alabama*, 74 F. 3d 1058 (11th Cir. 1996); *Wilson v. Minor*, 220 F. 3d 1297 (11th Cir. 2000); *Dillard v. Baldwin County Commissioners*, 225 F. 3d 1271 (11th Cir. 2000). Petitioners noted as well that the 1988 injunction restructuring local government was premised in part on Alabama's generally poor history of racial equality, and contended that history of intentional racial discrimination did not apply to Chilton County, *see Dillard v. Baldwin County Commission*, 222 F. Supp.2d 1283, 1287-88 (M.D. Ala. 2002)(noting erroneous 1988 finding of racially-inspired manipulation of local government structure of Baldwin County, Alabama).

A. The Ruling Below Conflicts With Seventh Circuit Precedent.

The Eleventh Circuit decision conflicts with *Assoc. of Community Organizations for Reform Now* ("ACORN") v. *Edgar*, 56 F.3d 791 (7th Cir. 1995). In that case, an injunction was issued to remedy non-compliance by the State of Illinois with the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg *et seq.*, popularly known as the "motor voter" law. *Id.* Among its provisions was an order for "the defendants to designate a chief election official to be responsible for coordinating the state's responsibilities under the 'motor' voter law. . . ." *Id.* at 797. The State asserted on appeal that the motor voter law itself – not the remedy – improperly required it to change its laws to conduct registration for federal elections. *ACORN*, 56 F.3d at 793 (noting reliance on *New York v. United States*, 505 U.S. 144 (1992)).

Notwithstanding the State's failure to appeal the remedy, and despite this waiver, the Seventh Circuit held itself authorized to vacate that provision of the injunction because "the ground relates to the propriety or scope of an injunction." The State's indifference was not controlling. *Id.* at 797 (citing cases). Despite the absence of a controversy between the parties as to issue of relief, or, indeed the State's failure to assert this ground on appeal, the Seventh

Circuit vacated this portion of the injunction. As Judge Posner stated:

> "The value of decentralized government is recognized more clearly today than it has been for decades. This recognition, born of experience, enables us (and not only us) to see that federal judicial decrees that bristle with interpretive difficulties and invite protracted federal judicial supervision of functions that the Constitution assigns to state and local government are to be reserved for extreme cases of demonstrated noncompliance with milder measures."

ACORN, 56 F. 3d at 798. Clearly, the Eleventh Circuit forgot these principles when it reinstated the 1988 Decree.

In deciding that the district court order must be reversed and the injunction reinstated, the Eleventh Circuit wrongly required more adverseness *between Dillard and the Defendants.* Because they did not present conflicting positions on appeal, the Eleventh Circuit reasoned there to be no case or controversy between them. *See Dillard,* 495 F.3d at 1339. Such reasoning is what the Seventh Circuit found not controlling. Certain injunctions must be set aside, even though those directly affected find them acceptable. So the Eleventh Circuit should have ruled here.

B. There Is a Split in the Circuits on the Power of a Federal Court to Vacate its Injunction, Without Regard for a Proper Motion from a Party.

There is a well-acknowledged split in the circuits on whether a court may set aside injunctive relief pursuant on its own motion. Other courts have faced the question whether they may set aside a public injunction without regard for whether the proper parties have requested it. The First and Sixth Circuits hold that a court may not grant Rule 60(b) relief from the operation of an injunction *sua sponte.* *See United States v. Pauley,* 321 F. 3d 578, 581 (6th Cir. 2003); *Dr. Jose S. Belaval, Inc. v. Perez-Perdomo,* 465 F. 3d 33, 37 (1st Cir. 2006). The Second, Fourth, Fifth, and Ninth Circuits have held that "nothing forbids the court to grant such [Rule 60(b)] relief *sua sponte.*" *Fort Knox Music, Inc. v. Baptiste,* 257 F. 3d 108, 111 (2d Cir. 2001); *United States v. Jacobs,* 298 F. 2d 469, 472 (4th Cir. 1961); *Alberti v. Klevenhagen,* 46 F.3d 1347, 1365-68 (5th Cir. 1995) (*sua* sponte power exists "regardless of parties silence or inertia"); *Kingsvision Pay-Per-View, Ltd. v. Lake Alice Bar,* 168 F. 3d 347, 351-52 (9th Cir. 1999).

CONCLUSION

Based on the foregoing, Petitioners respectfully request that this Court issue a writ of certiorari to the Court of Appeals for the Eleventh Circuit to determine whether a private voter has standing to claim violations of the Voting Rights Act and Equal Protection Clause even where other citizens of the district in which he lives suffer similarly. In addition, the Court should grant the writ to determine whether the Eleventh Circuit misused its equitable power by reinstating the 1988 injunction.

Respectfully Submitted,

Albert L. Jordan
Counsel of Record
Annemarie C. Axon
Algert S. Agricola, Jr.

No. 08-____

In The
Supreme Court of the United States

GILBERT GREEN and CALVIN JONES, Jr.
Petitioners,

v.

JOHN DILLARD,

v.

CHILTON COUNTY COMMISSION,
ROBERT M. MARTIN, PROBATE JUDGE
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Eleventh Circuit

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 060-14950

D. C. Docket No. 87-01179-CV-T-N

JOHN DILLARD, et al.,

Plaintiffs-Appellant,

ROBERT R. BINION, JOHN WRIGHT,

Intervenor-Plaintiffs-Appellants,

GILBERT GREEN, et al.,

Intervenor-Plaintiffs-Appellees,

versus

CHILTON COUNTY COMMISSION, et al.,

Defendants-Appellees

Appeal from the United States District Court
for the Middle District of Alabama

(August 20, 2007)

Before TJOFLAT, BLACK and EBEL,[1] Circuit Judges.

PER CURIAM:

In these appeals, this court is confronted again by a third-party attempt to intervene in a long-pending case to vacate injunctive relief entered below. Here, the challenged consent decree was obtained by a class of African-American plaintiffs as part of the landmark *Dillard* litigation that restructured much of Alabama's county-level governance in accordance with the then-prevailing understanding of the Voting Rights Act. We recognize that the intervenors raise significant questions about the ongoing vitality of the remedy approved by the district court nearly twenty years ago. However, we determine that, in light of recent Supreme Court precedent, they lack the standing necessary to challenge that remedy. Accordingly, we must VACATE the district court's orders and REMAND to the district court with instructions to DISMISS the intervenors' complaint without prejudice.

BACKGROUND

We need not provide yet another extensive recapitulation of the *Dillard* litigation's lengthy history. *See Dillard v. Baldwin County Comm'rs (Baldwin V)*, 376 F.3d 1260, 1262-63 (11th Cir. 2004). Suffice it to say that in 1988 the Chilton County Commission, by consent decree, settled claims raised by the class of African-American voters in Chilton County represented by John Dillard (collectively, "Dillard") under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Equal Protection Clause of the Fourteenth Amendment. *See Dillard v. Chilton County Bd of Educ.*, 699 F. Supp. 870, 872 (M.D. Ala. 1988). The parties agreed, inter alia, to increase the number of commissioners from four to seven, to abolish the numbered-post system of electing commissioners and replace it with a cumulative voting system, and to institute a system by which the rotating Commission chairmanship would occasionally be offered to an African-American commissioner, if one had elected. (Rec. Doc. 5 at ¶¶ 1, 4.) Subsequent decisions of the Supreme Court and this circuit cast this remedy into some doubt. *See Holder v. Hall,* 512 U.S. 874 (1994); *Nipper v. Smith,* 39 F.3d 1494 (11th Cir. 1994) (en banc); *Dillard v. Baldwin County Comm'rs (Baldwin III),* 225 F.3d 1271 (11th Cir. 2000).[2] In 2003, Gilbert Green and Calvin Jones, Jr., ("the Intervenors") moved to intervene in the instant case seeking to vacate the district court's order approving the 1998 settlement. (Motion for Post-Judgment Intervention filed Feb. 21, 2003.)

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[1] Honorable David M. Ebel, United States Circuit Judge for the Tenth Circuit, sitting by designation.

In response to this Motion to Intervene, the County Commission filed a "Motion for Status Conference" in the district court. (Motion for Status Conference filed Feb. 28, 2003.) In its motion, the

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[2] One of the issues presented by the merits of this appeal is whether the restrictions of Holder and Nipper apply to consent decrees where the form of the relief has been agreed to by the parties, in addition to consent to liability. Because we dismiss this appeal for lack of jurisdiction, we do not address this merits issue.

Commission observed that "[r]ecent case law indicates that the seven-member, cumulative-voting remedy was not appropriate" and requested the district court "set this case for a status conference, and at that time . . . discuss with the parties whether and to what extent the settlement agreement remains viable . . . ." (*Id.* ¶¶ 2-3.) The district court denied the motion, explaining that it would decide whether a status conference was appropriate after resolving the pending motion for post-judgment intervention. (Order filed Mar. 7, 2003.)

Dillard filed a response on March 6, 2003, opposing both the proposed intervention and the request for a status conference. (Plaintiff's Response to Green Motion to Intervene and to Defendant's Motion for Status Conference filed Mar. 6, 2003.) Citing *Baldwin III* and conceding that the district court was "bound by Eleventh Circuit precedent to allow Green and Jones to intervene,"[3] Dillard argued that the motion to intervene should be denied because the proposed intervenors sought to intervene as plaintiffs. (*Id.* ¶ 3.) Intervention was granted by the district court in a brief order that did not give explicit consideration to either the Intervenors' standing to intervene not the propriety of intervention under the standards of Fed. R. Civ. P. 24. (Order filed Mar. 20, 2003.)

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[3] In light of this concession, questions of timeliness and adequacy of representation are not before this court. Accordingly, we offer no view on the propriety of the Green intervention under the standards imposed by Fed. R. Civ. P. 24(a). We clarify, however, that Baldwin III did not address these questions either. See 225 F.3d at 1274 ("Neither party opposed the Intervenors' motion, but both reserved the right to challenge the legal sufficiency of the Intervenors' complaint."). Accordingly, it provides little, if any, analytical assistance for district courts addressing questions about the propriety of a proposed intervention under Rule 24.

Upon the district court's granting of the motion to intervene, the Intervenors' complaint-in-intervention was filed in the district court on the same day. (*See* Rec. Doc. 7 (Complaint-in-Intervention).) In five counts, the complaint argued that continued enforcement of the consent decree, both in specific respects and in toto, was unlawful. Specifically, Counts I and II contended (1) that, by altering the size of the Commission and by replacing the probate judge as its ex officio chair, the district court had exceeded its authority under the Voting Rights Act and violated the Tenth and Eleventh Amendments; (2) that the "parties' consent to the entry of the relief provided in the Consent Decree does not provide a sufficient basis for a court to require structural alterations in the form of government for Chilton County"; and (3) that conducting elections pursuant to the consent decree's terms "violates the Green Intervenors' constitutional rights." (*Id.* at 8-9 (¶¶ 16-17, 19-20).) Counts III and IV, denominated as seeking relief under Fed. R. Civ. P. 60(b)(5), stated that further prospective application of the consent decree was inequitable based on a change in law disavowing cumulative voting as a Voting Rights Act remedy and on an alleged lack of standing by Dillard, as well as arguing that conducting elections pursuant to the consent decree "violates the Green Intervenors' voting rights." (*Id.* at 10-11 (¶¶ 22-23, 25-26).) Count V, finally, argued (1) that, by instituting the rotating Commission chairmanship system and "direct[ing] the Commission members to engage in conduct which violates the Equal Protection Clause of the Fourteenth Amendment," the district court has exceeded its authority under the Voting Rights Act and violated the Fifth Amendment; and (2) that conducting elections pursuant to the consent decree's terms "violates the Green Intervenors' constitutional and voting rights." (*Id.* at 11 (¶¶ 28-29).)

The Commission, acting under the threat of a motion for entry of default, answered the Intervenors' complaint by admitting virtually all allegations that the consent decree exceeded the district court's authority and violated federal law, though it denied all allegations that elections conducted pursuant to the decree's terms violated the Intervenors' constitutional or voting rights. (Rec. Doc. 8 (Answer) at 3-5). The answer, however, did not join in the Intervenors' request for relief, nor did it pray independently for relief from continued application of the consent decree. (*See id.*) So far as the record reveals, the Commission took no action on its own behalf to invalidate the consent decree. Importantly, the Commission never filed any claim, cross-claim, or counterclaim asserting its own rights and seeking to vacate the consent decree, not did it file any claims of any nature against Dillard which would have revived the prior adversarial conflict between the original parties. Dillard subsequently filed briefs in opposition to the Intervenors, but filed no pleading responsive to the complaint-in-intervention, apparently because the complaint-in-intervention sought relief only against the Commission and codefendant Probate Judge Martin.

Following oral argument, the district court, believing itself bound by this court's decision in *Baldwin III* and *Baldwin V*, agreed with the Interventors' arguments and vacated the consent decree. *Dillard v. Chilton County Comm'n*, 447 F. Supp. 2d 1273, 1276-79 (M.D. Ala. Aug. 14, 2006). In a later order, it rejected the Interventors' call for a prompt special election or, alternatively, prompt gubernatorial appointment of new commissioners. *Dillard v. Chilton County Comm'n*, 452 F. Supp. 2d 1193, 1202 (M.D. Ala. Sept. 21, 2006). It instead ordered the Commission to formulate via public hearings an election system to be used at the next regularly scheduled election and to present the plan to the Alabama Legislature for its approval. *Id.* at 1197, 1202.

After entry of the order vacating the consent decree, Dillard, as the original plaintiff, appealed, challenging the vacatur and further alleging that the Intervenors lacked standing to intervene in the first instance. In a separate appeal consolidated with Dillard's, the Intervenors appealed the order setting forth the court's proposed mechanism and timeframe for unwinding the effects of the vacated consent decree. The Commission filed a brief only in the second of these appeals, omitting any consideration of the merits of Dillard's appeal. Instead, it limited its arguments to defending the district court's September 21, 2006, order that gave the Commission until the next regularly scheduled election to design and receive approval for a new governmental structure. Interestingly, the Commission's brief on appeal adopted Dillard's statement of the case, including Dillard's allegations that the Intervenors had suffered no personal injury and lacked standing. (Comm'n Br. at 2; *see* Dillard Br. at 7-9.)

The district court's order of August 14, 2006, vacating the consent decree and its order of September 21, 2006, establishing the timetable for unwinding the consent decree and enjoining the Commission to implement it, are each appealable interlocutory orders. We thus have jurisdiction over both of the instant appeals pursuant to 28 U.S.C. § 1292(a)(1).

DISCUSSION

Any party, whether original or intervening, that seeks relief from a federal court must have standing to pursue its claims. Intervening parties, however, need not in every instance demonstrate that they independently fulfill the familiar requisites of injury-in-fact, causation, and redressability. Because of lessened justiciability concerns in the context of an ongoing Article III case or controversy, intervenors in this circuit may in some cases be permitted to "piggyback" upon the standing of original parties to satisfy the standing requirement. This rule is not without limits: Intervenors must show independent standing to continue a suit if the original parties on whose behalf intervention was sought settle or otherwise do not remain adverse parties in the litigation. Similarly, "piggyback" standing requires the existence of a justiciable case or controversy at the point at which intervention is sought.

In the appeals now before us, we first address whether the Intervenors can establish independent standing. The Intervenors' claims that application of the consent decree violates their "constitutional and voting rights" rests upon this circuit's prior holdings that a voter's assertion of his or her interest in a democratically selected form of government describes a concrete and particularized injury sufficient to confer standing. However, in light of intervening Supreme Court precedent, we conclude this must now be labeled a generalized grievance, and we thus hold that these Intervenors have not independently met the standing requirement.

We then turn to the alternative issue of "piggyback" standing. The entry of the original consent decree resolved the underlying controversy between the original parties. And the long dormancy of this case on the district court's docket reveals nothing prior to the attempted intervention that resuscitated its adversarial character. Although the Commission's actions subsequent to the attempted intervention are at least ambiguous, the critical moment at which the Intervenors needed to establish the existence of a case or controversy upon which they could piggyback standing was at the time intervention was sought. Because we find no continuing adversarial controversy between the original parties at this point, the Intervenors could not piggyback on the standing of any of the original parties. Indeed, at no time during the district court proceedings following the motion to intervene did any original party assert a claim for further judicial relief against any other original party. Nor, on appeal, is there any adversity between the original parties to this action. Instead, all original parties seem united on the position that the Intervenors lack standing to intervene.

Thus, these Intervenors cannot demonstrate that they had standing under either of the avenues available to them for doing so. Accordingly, we conclude the district court lacked jurisdiction over their claims.

I. Under *Lance v. Coffman*, the Intervenors have no independent standing to bring the generalized claims in the Complaint-in-Intervention.

Although the district court below concluded under the logic of *Baldwin III* that the Intervenors had sufficiently alleged an individualized injury, 447 F. Supp. 2d at 1278-79, standing is "a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims," and we review the district court's conclusion on this question de novo, *Baldwin III*, 225 F.3d at 1275. Among the three requirements of this "irreducible constitutional minimum," first and foremost is an allegation of "an injury in fact – an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotations omitted). "An interest shared generally with the public at large in the proper application of the Constitution and laws will not do." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997). Federal courts, bound by Article III, are "not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution." *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2562 (2007). And "a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him that it does the public at large – does not state an Article III case or controversy." *Id.* at 2563-64 (quoting *Lujan*, 504 U.S. at 573-74).

Baldwin III analyzed jurisdictional facts essentially identical to those in this case and determined that intervening citizen voters had standing to challenge another *Dillard* consent decree. 225 F.3d at 1277. In doing so, it relied on our prior conclusions in an earlier case that citizens' interests in challenging a newly imposed election scheme to which they are subject were sufficiently concrete and particularized to confer standing. *Id.* Specifically, *Baldwin III* relied heavily on our decision in *Meek v. Metropolitan Dade County*, in which we held that voters who attempted to intervene as appellants to defend an election system against a Voting Rights Act challenge had standing. *See* 985 F.2d 1471, 1480 (11th Cir. 1993) (per curiam). In *Meek*,

> [t]he intervenors sought to vindicate important personal interests in maintaining the election system that governed their exercise of political power, a democratically established system that the district court's order had altered. As such, they alleged a tangible actual or prospective injury and did not merely challenge unlawful conduct in the abstract. *See generally, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, [574-76], 112 S.Ct. 2130, 2144, 119 L.Ed.2d 351 (1992). Moreover, we reject appellees' contention that the intervenors had only nonjusticiable generalized grievances simply because they asserted interests widely shared by others. *Allen*

> *v. Wright*, 468 U.S. 737, 756-60, 104 S.Ct. 3315, 3327-29, 82 L.Ed.2d 556 (1984).

Id.

We subsequently upheld *Meek*'s reasoning against repeated challenges that it was wrongly decided in light of the Supreme Court's later decisions in *Arizonans for Official English*, 520 U.S. at 43, *Raines v. Byrd*, 521 U.S. 811 (1997), and *United States v. Hays*, 515 U.S. 737 (1995).[4] *See*

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[4] In Arizonans for Official English, sponsors of a state ballot provision that amended the state constitution to make English the official state language intervened to appeal a district court's decision declaring te amendment unconstitutional, after the state defendants decided not to appeal. Though the Supreme Court doubted that initiative sponsors had "legislative standing" to defend the amendment's constitutionality, it did not reach the question, instead finding their claims moot. But as we noted in Baldwin III, "[t]he question of whether [the intervenors] had standing as the sponsors of particular legislation . . . provides no guidance on whether voters who live within the governing unit have standing to challenge an allegedly illegal voting scheme to which they are subject by virtue of their residence " 225 F.3d at 1278-79

Similarly, in Raines, members of Congress challenged the constitutionality of the Line Item Veto Act, but their claims were dismissed for lack of standing. Baldwin III again found this ruling made no impact on the vitality of Meek, stating that

> the fact that the Congressmembers in Raines did not have standing to challenge the Act because they had not been harmed as individuals, but only as members of an

> institution which they were not authorized to represent, sheds no light on whether the voters in this case, who are individually subject to and affected by the election scheme they challenge, have standing.

Id. at 1279.

In Hays, voters challenged a state legislative redistricting plan, arguing that an adjacent district's boundaries had been unlawfully influenced by considerations of the racial makeup of that district's voters. The Supreme Court rejected their claims, but emphasized "that voters who lived in the allegedly gerrymandered district would have suffered an injury sufficient to establish standing." Id. We again held in Baldwin III that Hays did not diminish the precendial value of Meek:

> Hays set forth a bright-line standing rule for a particular class of cases alleging illegal racial gerrymandering with respect to voting districts: if the plaintiff lives in the racially gerrymandering district, she has standing, if she does not, she must produce specific evidence of harm other than the fact that the composition of her district might have been different were it not for the gerrymandering of the other district. Hays' narro holding regarding standing in the gerrymandering context is entirely consistent with our broader holding in Meek that respondents had standing to defend the election scheme to which they were subject when that entire election scheme had been challenged as illegal. In both cases, the essential point remains that one who resides in the area directly affected by the allegedly illegal voting scheme has standing to challenge that scheme. Hays is in no way inconsistent with our holding in Meek.

Baldwin III, 225 F.3d at 1278-80; *Wilson v. Minor*, 220 F.3d 1297, 1303 n.11 (11th Cir. 2000).

But it is clear that we can no longer do so in light of the Supreme Court's most recent pronouncement on voter standing in *Lance v. Coffman*, 126 S. Ct. 1194 (2007) (per curiam).[5] In *Lance*, voter plaintiffs filed suit in federal district court to challenge a court-ordered redistricting plan, arguing that the Elections Clause of Art. I, § 4, required a legislatively drawn plan and that elections held under the court-drawn plan were unlawful. *Id.* at 1195-96. Their asserted interest was as *citizen voters in the district that they alleged should have been legislatively, rather than judicially, drawn.* They claimed that judicial drawing of the district violated the rights of all citizens in the district to have the district drawn by the state legislature as prescribed by the Elections Clause of Art. I, § 4 of the United States Constitution. *Id.* The Supreme Court

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Id. at 1279-80.

[5] Baldwin III's distinctions of prior Supreme Court precedents do not save Meek in light of Lance. In contrast of Arizonans for Official English, Raines, and Hays, the claims at issue in Lance, which the Court held did not satisfy standing requirements, are directly analogous to those that we held sufficient to establish standing in Meek. Like Hays, Lance considers voter, not legislator, standing. 127 S. Ct. at 1195-96. But Lance dismissed for lack of standing the claims of voter plaintiffs even though they voted in the district where the governmental structure was being challenged as unconstitutional. Id. at 1198. Thus, Meek can no longer carry the weight attributed to it by the Intervenors, the district court, and our prior precedents.

unanimously held that the *Lance* plaintiffs should be dismissed for lack of standing and their claim dismissed as a generalized grievance. Id. at 1198. The Court noted that

> the problem with [the plaintiffs'] allegation should be obvious: The only injury plaintiffs allege is that the law – specifically the Elections Clause – has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past. It is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing. *See, e.g., Baker v. Carr*, 369 U.S. 186, 207-208, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

Id.

The distinction referenced in *Lance* refers to the difference between plaintiffs such as those in *Baker* and *Whitcomb v. Chavis*, 403 U.S. 124 (1971), who alleged concrete and personalized injuries in the form of denials of equal treatment or of vote dilution, and plaintiffs like those in the instant case, *Baldwin III*, or *Lance* itself, who merely seek to protect an asserted interest in being free of an allegedly illegal electoral system. This properly denominates as cognizable, for instance, the injuries of plaintiffs who are subject to racial classification in voting systems, *see e.g., Shaw v. Reno,* 509 U.S. 630 (1993), and to vote dilution, whether motivated by race or other factors, *see, e.g., Thornburg v. Gingles,* 478 U.S. 30 (1986) (racially motivated vote dilution); *Baker,* 369 U.S. at 186 (non-racially motivated vote dilution); *Leser v. Garnett,* 258 U.S. 130 (1922) (gender-based vote dilution).[6] But the more generalized grievances asserted by the Intervenors here do not assert a concrete and personalized injury, and accordingly they lack personal standing to bring them for judicial resolution.

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[6] In supplemental briefing to this court addressing the impact of Lance upon our analysis of the Green Intervenors' standing, the Green Intervenors argue that the Supreme Court's citation in Lance to Fairchild v. Hughes, 258 U.S. 126 (1922), and the contrasting absence of a citation to Leser suggest another category of particularized injuries in voting rights cases which remain cognizable under Lance. Namely, they contend that "[w]hen State law allows a private claim about law and a particular voter if focused on a particular place, instead of the public at-large [sic], Article III does not preclude relief to a voter." We read this as an argument that state law may, in some instances, confer a judicially cognizable and particularized interest, the invasion of which may constitute an injury for purposes of Article III standing analysis. See Warth v. Seldin, 422 U.S. 490, 500 (1975).

Even accepting this general point, however, we conclude it provides no benefit to the Green Intervenors here. The state law upon which their claims appear to be founded is one which merely defines the structure of county governance; they do not suggest any state law that provides them with a particularized cognizable interest. The interest created by a structured law of this type is necessarily generalized to all voters in the county. In that regard, it is an interest that is legally indistinguishable from that rejected in Lance.

The Intervenors assert only the generalized incompatibility of the consent decree with the rights of all citizens in the county to be free of judicial interference, unauthorized by § 2 of the Voting Rights Act, with the democratically selected form of local governance.[7] This is not a form of injury particularized to the Intervenors, but is rather an undifferentiated harm suffered in common by all citizens of the county.

The Intervenors themselves have consistently described their claims in terms that underscore the lack of particularized harm, and they echo the allegations found to be insufficient in *Lanc*[illegible]. In their initial motion to intervene, they framed their claims not as personal ones, but rather as citizens' claims seeking to force the district court and the County Commission to follow federal law:

> Movants seek to challenge certain aspects of the remedial order of [the district court] entered on or about June 23, 1988 . . . . In particular, Movants believe that the remedial order is not in conformity with recent judicial rulings which prohibit a federal court from ordering an increase in the size of local elected bodies, as a part of its remedy for a violation of the Voting Rights Act.

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[7] The Intervenors did not claim, of course, that the Commission could not on its own and following the procedures of Alabama law decide to have seven commissioners elected by cumulative voting. Their objection is only that this form of government could not be imposed by judicial decree.

(Motion for Post-Judgment Intervention filed Feb. 21, 2003.) On appeal, the Intervenors expressed their claim as follows: "Fundamentally, the 1988 order provided relief[] which was not authorized by the Voting Rights Act. Because it also impaired the interests of Alabama and its citizens in their chose form of local government . . . , it was inconsistent with the proper construction of the Act."[8] (Aple. Br. at 13.) According to the Intervenors' conception of the rights and interests at issue here,

> [v]acating the 1988 order reflects proper respect for the right of local governments to constitute themselves in the manner provided by their States. Further, the district court's [vacatur]

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[8] The Green Intervenors, in their supplemental briefing, attempt to inflate this argument and transform their claims as citizens into "actions 'on behalf of the state.'" In doing so, they contend that they are indistinguishable from relators pursuing causes of action belong to the state, not merely "private citizens acting on their own behalf." *See Lance*, 127 S. Ct. at 1198 (citing *Smiley v. Holm*, 285 U.S. 355 (1932) and *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), as examples of relator standing accruing under the Elections Clause). However, the Green Intervenors have never purported to be suing as relators, even if they were asserting interests of the State of Alabama. Their Complaint-in-Intervention and their briefs before this court have consistently made clear that the Green Intervenors are asserting their interests as private citizens. These interests, as we describe, are not particularized to the Green Intervenors and are thus too generalized to support standing. Moreover, they provide us with no citations to state or federal statutes giving private citizens authority as relators to maintain an action on behalf of the State or the county commission.

> order preserves Tenth Amendment rights, a proper understanding of sovereignty in a federal system, and the limits of Congress's authority under the Reconstruction Era Amendments.

(Id. at 15-16.) And, the Intervenors contend, because the consent decree "exceeds [the district court's] authority granted by Congress in the Voting Rights Act, and violates the Tenth and Eleventh Amendments," elections conducted under the consent decree's terms "violate [their] constitutional rights." (Rec. Doc. 7 at 8-9 (Complaint ¶¶ 16-17).) The only "constitutional right" to which they advert, however, is the putative right shared by all citizens to be governed by their "democratically chosen form of local government."[9] (Aple. Br. at 29).

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[9] Count V of the Complaint-in-Intervention, addresing the rotation of the Commission chairmanship, does not purport to state a claim of violation of the Intervenors' personally held rights under the Equal Protection Clause of the Fourteenth Amendment. Rather, it merely raises the same allegations as elsewhere that the district court, by imposing unauthorized injunctive relief, exceeded its authority and violated legal rights held by the Commission members. In that count, the Intervenors allege that the consent decree "directs the Commission members to engage in conduct which violates the Equal Protection Clause of the Fourteenth Amendment . . . to the extent it provides for commissioners to be offered the chair of [the] Commission . . . on the basis of the race of the commissioner." (Rec. Doc. 7 at 11 (Complaint ¶ 28).) The gravamen of this claim is that Commission members' rights against invidious racial classification are being violated by the consent decree provision, as enforced by the district court. And,

As already noted, the Intervenors do not seriously argue that either the addition of Commission members or the use of cumulative voting inherently constitutes an affirmative violation of § 2 of the Voting Rights Act. Rather, they argue only that such measures are not authorized by § 2 as forms of remedial relief against antecedent violations. (*Id.* at 21, 30). Moreover, they expressly disclaim any injury based on vote dilution or other, more concrete harms. "The district court was correct that Green did not complain of vote dilution, but § 2 [of the Voting Rights Act] and the precedents of this Court do not require him to do so." (*Id.* at 27.) Their

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like the other claimed violations of the Intervenors' "constitutional and voting rights" (id. at ¶ 29), this is a generalized grievance shared in common by all voters in Chilton County based on the Intervenors' asserted interest in seeing that the law is followed. Accordingly, it too falls under the rule of Lance.

Count V suffers from the further defect that it fails to allege that the provision has ever been invoked to offer an African-American commissioner the chairmanship, that any such offer has been accepted, or that any potential offer is likely to be accepted in the future. (See id. at ¶¶ 28-29.) Absent such allegations of "actual or imminent, not conjectural or hypothetical" harm, Lujan, 504 U.S. at 560, the Intervenors have failed to allege a cognizable, actual or imminent injury-in-fact. The allegation that "Probate Judge Martin has conducted elections for members of the Chilton County Commission in a manner that violates the Green Intervenors' constitutional and voting rights" bears no obvious connection to equal protection violations occurring among the Commission members at an unspecified later time. Thus, the Intervenors fail to allege a cognizable injury for standing purposes under Count V as well.

assertion of rights purportedly secured under § 2 and the Tenth and Eleventh Amendments is grounded entirely in the injury analysis of *Baldwin III*. (*Id.* at 26-27, 29.) Under this analysis, the Intervenors assert they "ha[ve] standing to seek to restore [their] democratically chosen form of government." (*Id.* at 45.)

The Intervenors' claims thus can be easily summarized. Aggrieved by the changes in the structure of their county government wrought by the 1988 consent decree, they sought to vacate it. The decree was unlawful, according to the Intervenors, not because it affected *their* voting power or subjected *them* to invidious racial classification or otherwise injured *them* directly. Rather, the decree was unlawful because *the district court*, which approved the consent decree, exceeded its statutory remedial authority, violated the Tenth and Eleventh Amendments, and forced the County Commission to violate the Fourteenth Amendment by rotating its chairmanship to include African-American commissioners. The Intervenors allege the district court could neither enter such a decree nor enforce it once entered. And they allege the County Commission and the Probate Judge could not legally conduct elections pursuant to its terms.

But in light of *Lance v. Coffman*, "the problem with [these] allegation[s] should be obvious." 127 S. Ct. at 1198. "The only injury [the Intervenors] allege is that the law" – specifically, § 2 of the Voting Rights Act and the Fifth, Tenth, and Eleventh Amendments – "has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance" that the Supreme Court has warned must not be countenanced. *Id.* And the Intervenors' interest in "restor[ing their] democratically chosen form of government" (Aple Br. at 45) is no more individualized than the *Lance* plaintiffs' interest in overturning judicially drawn electoral districts in favor of legislatively drawn ones.[10]

"The decision to seek review 'is not to be placed in the hands of concerned bystanders,' persons who would seize it 'as a vehicle for the vindication of value interests.'" *Arizonans for Official English*, 520 U.S. at 64-65 (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)). Neither the injury not the interest asserted by the Intervenors here can be distinguished from those dismissed in *Lance*. Therefore, we hold that the Intervenors fail to allege a particularized injury-in-fact sufficient to confer Article III standing independent of the original parties to this action.

II. The Intervenors cannot piggyback on the standing of the original parties.

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[10] In their supplemental briefing, the Green Intervenors attempt to distinguish their claims from those at issue in Lance by arguing that they seek only to defend, not overturn, the manner of elections established by state law. They are, of course, actively seeking to change the status quo, and they have requested affirmative relief from the 1988 consent decree. Regardless, then, of whether they are defending or attacking the state-sanctioned election system, they have an obligation as post-judgment intervenors, similar to that placed on plaintiffs, to show that they have standing to bring their claims before a federal court. And the interests they have asserted are too generalized to support their own independent standing under Lance.

Having determined that the Intervenors cannot establish Article III standing of their own account, we turn now to the alternative mechanism available to them for doing so: piggybacking upon the standing of the original parties. However, doing so requires the existence of an ongoing adversarial case or controversy among existing parties, and the lack of any adversarial character in the relations between the original parties when the motion to intervene was filed indicates no sufficiently adversarial case or controversy was ongoing into which the Intervenors could inject themselves without making an independent showing of Article III standing. Neither the mere existence of a consent decree nor the continuation of the district court's jurisdiction for enforcement purposes is enough to support piggyback standing absent an existing dispute between the original parties for which they seek a judicial resolution.

Commonly, intervenors "ride 'piggyback' on the . . . undoubted standing" of original parties to an ongoing case or controversy. *Diamond*, 476 U.S. at 64. Indeed, we have formalized this rule, stating that "a party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case or controversy between the parties already in the lawsuit." *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989). This general policy, however, "presumes that there is a justiciable case into which an individual wants to intervene." *Id.* at 1212.

However, when the original parties have settled the claims between them, and the intervenor wishes to challenge the settlement, we have required the intervenor to have independent standing. *E.g., Cox Cable Commc'ns, Inc. v. United States*, 992 F.2d 1178, 1181 (11th Cir. 1993) (requiring intervenor to demonstrate standing to appeal entry of permanent injunction settling claims between original parties). *Diamond* itself dismissed a defendant-intervenor's appeal for lack of standing to appeal where none of the original defendants pursued the appeal alongside him. 476 U.S. at 68. The rule was stated: "[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Id.* "Generally, an intervenor must have independent standing if the intervenor would be the only party litigating a case." *United States v. One-Sixth Share of James J. Bulger In All Present And Future Proceeds of Mass Millions Lottery Ticket No. M246233*, 326 F.3d 36, 40 (1st Cir. 2003).

We believe this rule extends to the situation presented here. So long as an original party on the intervenor's side remains party to the action and maintains an adversarial litigating position vis-a-vis the opposing parties, at least in this circuit an intervenor need not make an independent showing that he or she meets the standing condition of Article III. *Chiles*, 865 F.2d at 1213; *see also Diamond*, 476 U.S. at 68-69 (leaving undecided the question whether every intervenor must demonstrate standing in addition to the requirements of Fed. R. Civ. P. 24(a)).[11]

Here, however, there are no unsettled adverse claims in litigation between the original parties, either in the district court or on appeal. The settlement of Dillard's claims by entry of the consent decree ended the adversarial character of the original controversy between Dillard and the Commission. *See Lambert v. Turner*, 525 F.2d 1101, 1102 (6th Cir. 1975) (per curiam) ("Upon entry of the consent decree . . . there was before the district court no extant case or controversy between the defendant and any plaintiff.").

The entry of the consent decree, with the full support of all the settling

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[11] Other circuit courts have split in answering the question that the Supreme Court left open in Diamond. The Second, Fifth, Sixth, Ninth, and Tenth Circuits have joined this circuit's general rule that proposed intervenors need not demonstrate standing to intervene in an ongoing controversy. See San Juan County v. United States, 420 F.3d 1197, 1204-05 (10th Cir. 2005) (permitting intervention without an independent showing of standing); United States v. Tennessee, 260 F.3d 587, 595 (6th Cir. 2001) (same); Ruiz v. Estelle, 161 F.3d 814, 829-30 (5th Cir. 1998) (same); Yniguez v. Arizona, 939 F.2d 727, 731 (9th Cir. 1991) (same); U.S. Postal Serv. v. Brennan, 579 F.2d 188, 190 (2d Cir 1978) (same). The Seventh, Eighth, and D.C. Circuits, on the other hand, require a demonstration of intervenor standing in all cases. See Jones v. Prince George's County, 348 F.3d 1014, 1017 (D.C. Cir. 2003) (requiring intervenors demonstrate standing in addition to Rule 24 requirements); South Dakota v. Ubbelohde, 330 F.3d 1014, 1023 (8th Cir. 2003) (same); Solid Waste Agency v. U.S. Army Corps of Eng'rs, 101 F.3d 503, 507 (7th Cir. 1996) (same).

> parties, changed the calculus. While the parties to the decree are still parties to the action and to the appeal, they are now opponents in name only; in practical effect, the plaintiffs and the settling defendants no longer represent opposing interests. The underlying controversy between them has been resolved. Hence, given the case's current posture, there is no longer any extraneous support to which [the Intervenors] may cling [for purposes of the piggyback standing analysis].

United States v. AVX Corp., 962 F.2d 108, 112 (1st Cir. 1992). The mere existence of a permanent injunction or consent decree thus is insufficient to provide an ongoing case or controversy upon which an intervenor may "ride 'piggyback,'" in *Diamond*'s phrase. *See* 476 U.S. at 64 (requiring intervening doctor independently to demonstrate standing to appeal injunction enjoining enforcement of abortion law where original state defendants declined to appeal); *Cox Cable Commc'ns*, 992 F.2d at 1181 (inquiring into intervenor's standing, independent of original parties, in order to appeal entry of an injunctive decree that settled claims between original parties).

The district court's perpetuation of its jurisdiction for purposes of enforcement of a consent decree is insufficient, by itself, to justify piggybacking. *See United States v. Accra Pac, Inc.*, 173 F.3d 630, 633 (7th Cir. 1999) ("Like many other decree, this one reserved to the court the power of enforcement. But general language about continuing jurisdiction must be limited to enforcement of the decree that the parties are at loggerheads about some concrete subject, lest it condone a violation of Article III.").

The test of whether there is an ongoing litigation claim or controversy between the original parties to a consent decree must be whether one party or the other to the decree is seeking "judicial resolution of [the] dispute." *See Diamond*, 476 U.S. at 62. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements" of a case or controversy, *id.*, unless one party is actually seeking judicial relief against another. Here, although the Commission, in its answer to the complaint-in-intervention, could be viewed as being supportive of the Intervenors' claim for relief, the fact remains that it was the *Intervenors' claim*. The Commission itself *never made any claim of its own for judicial relief* against Dillard following entry of the consent decree. Thus, there was no existing case or controversy between the Commission and Dillard as to which the Intervenors could ride piggyback to establish standing.[12]

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[12] Of course, nothing in this opinion would preclude one of the original parties from bringing an additional claim against another existing party, under the district court's retained jurisdiction, to vacate, amend, or enforce the consent decree. However, no such effort was made or was outstanding in this case.

Though not cited to us by either party, we have considered whether the result we reach is inconsistent with our prior decision in *Loyd v. Alabama Department of Corrections*, 176 F.3d 1336 (11th Cir. 1999). Upon close examination, we find that *Loyd* is inapposite. In *Loyd*, the Alabama Attorney General, acting, along with the Commissioner of the Alabama Department of Corrections, as the Department's representative, intervened in federal district court after entry of a consent decree in order to seek termination of the under the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626. *Id.* at 1338-39. Following the district court's decision to terminate the decree, the original defendants, "[w]hile ambivalent about their position, . . . remained active in opposing the appeal of the district court's order." *Id.* at 1338-39 & 1339 n.2. Addressing first the Attorney General's intervention in the district court, we dismissed the appellants' claim that the intervenor was required to demonstrate standing because "a party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case or controversy between the parties already in the lawsuit." *Id.* at 1339 (quoting *Chiles,* 865 F.2d at 1213). We thus refused to dismiss the Attorney General's claim for lack of standing to intervene in the district court. *Id.* Turning to the question of standing to appeal, we noted that the intervenor was the appellee, not the appellant, and that the original defendants continued to oppose the appeal of the consent decree's termination. *Id.* at 1339 n.2. Accordingly, we found an extant case or controversy in this court that also allowed the appeal to proceed. *Id.*

Loyd did not expressly address the jurisdictional issue before us. Any precedent one might attempt to draw from *Loyd* on the instant issue would have to be from inferences based on *sub silentio* jurisdictional conclusions in that case.[13] "But it is well-established circuit law that 'we are not bound by a prior decision's *sub silentio* treatment of a jurisdictional question.'" *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1231 (11th Cir. 2007) (quoting *Okongwu v. Reno*, 229 F.3d 1327, 1330 (11th Cir. 2000)).

The long period of quiescence which followed the entry of the consent decree indicates that the parties considered the controversy underlying the decree to have been resolved. The Commission has not sought judicial relief from the consent decree, notwithstanding its apparent sympathies supportive of the Intervenors' claim. We thus conclude that, at the time intervention was sought, there was no basis upon which the Intervenors could justify piggyback standing.

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[13] We further note that, in filing its motion to terminate the consent decree there, "[t]he Attorney General claimed status as an intervenor under 18 U.S.C. § 3626(b)(2) of the PLRA and as a representative of the Alabama Department of Corrections," an original defendant and party to the consent decree. 176 F.3d at 1338-39 (emphasis added). The district court could have taken jurisdiction of the motion to terminate its earlier consent decree on this alternative basis, which would have obviated the need for any inquiry into the Attorney General's separate standing in the district court.

The standing of a prospective intervenor, whether independent or piggyback, is properly measured at the time intervention is sought in the district court. *See Comer v. Cisneros*, 37 F.3d 775, 801 (2d Cir. 1994) ("[T]he intervenors certainly had standing at the time they filed their motions to intervene."). In a case involving a class action seeking to remedy delays in processing of welfare-benefits applications, the Second Circuit provided a useful illustration of the timing of the standing evaluation for intervenors:

> In the present case, the original plaintiff at the time of the complaint was filed, *and each intervenor at the time of her motion to intervene*, was suffering from a delay beyond the period provided by federal law for the processing of her application for Food Stamp or ANFC benefits. Thus, *at the material time*, each plaintiff was suffering injury capable of being redressed by declaratory or injunctive relief. Accordingly, the district court erred in ruling that Appellants did not have standing . . . .

Robidous v. Celani, 987 F.2d 931, 938 (2d Cir. 1993) (emphasis added); *see also Enzo APA & Son, Inc. v. Geapag A.G.*, 134 F.3d 1090, 1093 (Fed. Cir. 1998) ("As a general matter, parties should possess rights before seeking to have them vindicated in court."); *cf. Focus on the Family v. Pinellas Suncoast Transit*

Auth., 344 F.3d 1263, 1275 (11th Cir. 2003) ("[A plaintiff's] Article III standing must be determined as of the time at which the . . . complaint is filed."); *Johnson v. Bd. of Regents,* 263 F.3d 1234, 1267 (11th Cir. 2001) ("[A] party's standing to sue is generally measured at the time of the complaint, with the effect of subsequent events generally analyzed under mootness principles."); *Lujan,* 504 U.S. at 570 n.5 ("[S]tanding is to be determined as of the commencement of suit . . . .").

Here, at the time the Intervenors filed their motion to intervene, there was no extant controversy or pending legal claim between the original parties – Dillard and the Commission. Even if we look at events subsequent to the motion to intervene, we find no ongoing extant judicial case or controversy between the Commission and Dillard to which the Intervenors could assert piggyback standing. Subsequent to the motion to intervene, the Commission never filed any claim, cross-claim, or counterclaim asserting any claim for judicial relief against Dillard. Notwithstanding the Commission's apparent sympathy with the Intervenors' claim, the Commission itself asserted no renewed claim for legal relief against Dillard.

Even on appeal, the Commission has scrupulously avoided arguing that the district court order vacating the consent decree should be upheld. On the merits of the district court order vacating the consent decree, the Commission is silent. The only position the Commission argues on appeal is that, if the consent decree is set aside, the district court was correct in not ordering immediate restructuring but rather allowing the Commission time to accomplish an orderly restructuring. Dillard does not take issue with that position of the Commission on appeal. So, even on appeal, we have no extant judicial controversy between the original parties to which the Intervenors could assert piggyback standing. In fact, it is telling that on appeal when Dillard asserted in his brief that the Intervenors lacked standing to assert their claims, the Commission adopted and agreed with that portion of Dillard's brief.

We, therefore, conclude that there was no ongoing case or controversy between the original parties to this litigation, either at the time the motion to intervene was filed or at any later time in the district court, nor is there any case or controversy between the original parties that is presented to this court on appeal. Thus, there is no dispute upon which the Intervenors can seek to piggyback standing.

CONCLUSION

These Intervenors are unable to establish individualized standing under *Lance v. Coffman,* because they present only generalized grievances seeking to force the County Commission to follow federal constitutional and statutory law. They are unable to establish "piggyback" standing based on an ongoing legal claim and dispute between the original parties to the litigation, because neither in the district court nor on appeal is there any ongoing legal claim for relief asserted by one of the original parties against the other. The Intervenors therefore lack standing on either of the bases available to them as intervenors, and their claims must be dismissed. Accordingly, we **VACATE** the orders of the district court terminating the consent decree and **REMAND** to the district court with instructions to **DISMISS** the Intervenors' claims, without prejudice, for lack of standing.

UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JOHN DILLARD, ET AL.,)
)
Plaintiffs,)
)
ROBERT R. BINION, ET AL.,)
)
Plaintiffs-Intervenors,)
) Civil Action No.
GILBERT GREEN, CALVIN)
JONES, JR.,) 2:87-CV-1179-MHT
)
Plaintiff-Intervenors,)
)
v.)
)
CHILTON COUNTY)
COMMISSION, ET AL.,)
)
Defendants.)

August 14, 2006

OPINION

MYRON H. THOMPSON, District Judge.

This is another *Dillard* case in which persons who were not parties to the original proceedings now challenge a final judgment affording relief under § 2 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973), and the Fourteenth Amendment to the United States Constitution (as enforced through 42 U.S.C. § 1983) to African-American citizens of the city or county at issue. Unless and until applicable precedent from the Eleventh Circuit Court of Appeals is overruled by that court en banc or by the United States Supreme Court, this court has no choice but to uphold that challenge.

I. BACKGROUND

The history of this case began 20 years ago as an outgrowth of proceedings in another case initiated in 1985 by plaintiff John Dillard and other plaintiff African-American citizens of Alabama in order to challenge the at-large, numbered-post election schemes employed by nine Alabama counties under § 2 and the Fourteenth Amendment. *Dillard v. Crenshaw County,* 640 F.Supp. 1347 (M.D.Ala.1986). This court made a state-wide finding that these election schemes were the product of, or tainted by, racially inspired enactments of the Alabama legislature, *id.* at 1357-60, and subsequently allowed the plaintiffs to expand their complaint to include 183 cities, counties, and county school boards that were using similar voting systems. *Dillard v. Baldwin County Bd. of Educ.,* 686 F. Supp. 1459 (M.D. Ala.1988).

The Chilton County Commission was among the entities added to the *Dillard v. Crenshaw County* litigation after this court made its initial findings. According to the 1980 census, Chilton County at that time had a total population of 30,610, and, of that number, 11.86% were black; the black population was dispersed throughout the county. Chilton County was governed by a five-member commission, one of whom was the probate judge and with the others elected as follows: First, a candidate ran at-large, or countywide, with all voters in the county allowed to vote for the candidate. Second, the candidate ran for a "numbered post" or separate place; each position carried a separate number, and each candidate qualified for a specific number and place, with each voter allowed to vote for only one candidate in each place. And third, the candidate had to receive a majority of votes cast in the primary to win the nomination of a political party; if no candidate received a majority of votes, a run-off primary election was held. The majority-vote requirement did not apply to general elections.

The commission admitted the § 2 and Fourteenth Amendment violation, and the parties proposed a seven-member commission elected by "cumulative voting." Under this system, each voter has as many votes as there are positions to be filled and may either divide her votes between candidates or concentrate her votes on a single candidate. *Holder v. Hall,* 512 U.S. 874, 910 n. 15, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (Thomas, J., concurring). "The system thus allows a numerical minority to concentrate its voting power behind a given candidate without requiring that the minority voters themselves be concentrated into a single district." *Id.* There are thus no majority-vote or numbered-post requirements.

Over objections from several members of the plaintiff class, this court approved and implemented the settlement, *Dillard v. Chilton Cty.*, 699 F.Supp. 870 (M.D.Ala.1988), and the Eleventh Circuit affirmed this court's action. *Dillard v. Chilton Cty.*, 868 F.2d 1274 (11th Cir.1989) (table).

Later, in *Holder v. Hall,* 512 U.S. 874, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994), a Supreme Court plurality held that a federal court cannot modify the size of an elected governing body in order to remedy a § 2 violation because "[t]here is no principled reason why one size should be picked over another as the benchmark for [determining whether vote dilution has occurred]." *Id.* at 881, 114 S.Ct. 2581. Subsequently, in *Nipper v. Smith,* 39 F.3d 1494 (11th Cir.1994) (en banc), the Eleventh Circuit held that, "under *Holder,* federal courts may not mandate as a § 2 remedy that a state or political subdivision alter the size of its elected bodies." *Id.* at 1532; *see also White v. Alabama,* 74 F.3d 1058, 1072 (11th Cir.1996) (holding that, under *Holder* and *Nipper,* the federal courts lacked the authority under § 2 to require even as part of an alleged settlement that the State of Alabama increase the size of its appellate courts).

In the wake of *Holder, Nipper*, and *White,* a challenge was leveled by intervening parties in one of the *Dillard* cases, *Dillard v. Baldwin County Comm'n,* to a court-ordered remedy (imposed based on this court's earlier state-wide finding of intentional discrimination) that, among other things, increased the size of the at-large elected commission from four to seven commissioners elected from single-member districts, thereby creating a majority-black district. 694 F.Supp. 836, 839-40 (M.D.Ala.), *amended by,*701 F.Supp. 808 (M.D.Ala.), *aff'd,*862 F.2d 878 (11th Cir.1988) (tables) (*Baldwin County Comm'n I*). In a critical decision, reversing the decision of this court in *Dillard v. Baldwin County Comm'n,* 53 F.Supp.2d 1266, 1272 (M.D.Ala.1999) (*Baldwin County Comm'n II*), the Eleventh Circuit held, first, that persons not parties to original proceedings had standing to challenge the court-ordered relief and, second, that they stated a cognizable challenge under § 2 to the relief, *Dillard v. Baldwin County Commissioners,* 225 F.3d 1271 (11th Cir.2000) (*Baldwin County Comm'n III*).

After a trial on remand, this court sustained the § 2 challenge and vacated the original relief, *Dillard v. Baldwin County Comm'n,* 222 F.Supp.2d 1283 (M.D.Ala.2002), *extended,* 282 F.Supp.2d 1302 (M.D.Ala.2003)(*Baldwin County Comm'n IV*), and the Eleventh Circuit upheld that decision, agreeing that the original court-ordered relief was inappropriate in light of the teaching in *Holder, Dillard v. Baldwin County Comm'n,* 376 F.3d 1260

(11th Cir.2004) *(Baldwin County Comm'n V)*; the appellate court also held that cumulative voting was not an appropriate current remedy in the place of the now-inappropriate original remedy. *Id.*

In March 2003, taking their cue from the challenge to the court-ordered relief in the *Baldwin County Comm'n* proceedings, Gilbert Green and Calvin Jones, Jr. intervened in this case claiming that, among other things, the 1988 relief afforded by this court for the § 2 and Fourteenth Amendment challenge to the election scheme for the Chilton County Commission violated *Holder, Nipper*, and *White.*

In March 2006, after the trial of this case, the State of Alabama enacted legislation, Act No. 2006-252, which provides state law authority for all local government election systems that are now operating under federal-court orders and that are not subject to a pending court challenge. Because the Chilton County Commission's cumulative-voting scheme is under a court challenge, Act No. 2006-252 does not apply to it.

II. DISCUSSION

The above background suggests, at least at first blush, that this case is squarely controlled by what happened in the *Baldwin County Comm'n* litigation. The plaintiffs here seek to distinguish that case on a number of grounds. Unfortunately for them, their efforts simply cannot succeed without a change in appellate law.

First, *Holder*, *Nipper*, *White*, and now *Baldwin County Comm'n* make clear that changing from an at-large election system to cumulative voting is not an appropriate § 2 remedy because, simply put, "there is no objective and workable standard for choosing [it as a] reasonable benchmark[ ] over the many forms of government." *Baldwin County Comm'n V*, 376 F.3d at 1264 (internal quotations omitted). The plaintiffs respond that the holdings, and the language explaining these holdings, are essentially beside the point because the court's power here to impose cumulative voting "proceeds not from the Voting Rights Act but from the consent decree Chilton County agreed to." Plaintiffs' brief (Doc. No. 151), at 18; *see also id.* at 27 ("The district court's power and duty to enforce the consent decree arise from the contractual obligations it establishes between the plaintiff class, the State and its political subdivision, not from the court's remedial authority under the Voting Rights Act.").

At issue here, the plaintiffs contend, is a simple contractual agreement between them and the Chilton County Commission; as long as that agreement does not violate the Voting Rights Act, that is the end of the inquiry. The sole question is whether the consent decree *violates* the Voting Rights Act, not whether it is *authorized* by the Act. Plaintiffs' brief (Doc. No. 151), at 31 ("an agreed upon remedy that exceeds the scope of the Court's authority in an adjudicated case must be distinguished from settlement provisions that are 'inconsistent' with the Act, that incorporate practices that themselves are prohibited by the Act").

And, as the plaintiffs explain, "Neither seven seats nor cumulative voting rules are inconsistent with the Voting Rights Act[;][n]either provision is a 'voting qualification or prerequisite to voting or standard, practice, or procedure ... which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.' " Plaintiffs' brief (Doc. No. 151), at 19 (quoting 42 U.S.C. § 1973(a)). "To the contrary," the plaintiffs add, "the Chilton County consent decree election system has been proven to promote the core Voting Rights Act objective of providing all citizens, in particular the protected class of African Americans, an equal opportunity 'to participate in the political process and to elect representatives of their choice.' " *Id.* at 19-20 (quoting 42 U.S.C. § 1973(b)).

The plaintiffs further maintain that because of this posture-of simply enforcing an agreement-this case is critically different from the *Baldwin County Comm'n* case, where the relief was imposed by the court, not consented to by the defendant county commission.

The intervenors here argue that the issue is not simply whether the remedy does not *violate,* or is not inconsistent with, the Voting Rights Act, but rather is whether the remedy is actually *authorized* by the Voting Rights Act. *White* and *Baldwin County Comm'n V* seem flatly to support the intervenors' position. In *White,* the appellate court stated that, "In cases where the Supreme Court has found that a consent decree violates the statute under which the relief is granted, the Court has not hesitated to set aside the decree." 74 F.3d at 1074 n. 52. In *Baldwin County Comm'n V,* the Eleventh Circuit explained *White* to say that "a district court has no authority to impose a remedy through a *consent decree* that is not *authorized* by the Voting Rights Act."376 F.3d at 1267 (emphasis added). The Eleventh Circuit therefore could not be more direct and unequivocal: settlement or not, consent decree or not, the court has no authority to impose a remedy not *authorized* by the Voting Rights Act.

To be sure, this language in *Baldwin County Comm'n V* is dictum, for the remedy there was court imposed; but in *White* the court was confronted with an alleged consent decree or settlement, and the above quote from *Baldwin County Comm'n V,* whether dictum or not, is the Eleventh Circuit's latest thinking on the way *White* should be read.

Moreover, and perhaps more pointedly, even if the question is whether the remedy violates the Voting Rights Act, the outcome here would be the same. In *Baldwin County Comm'n III,* the Eleventh Circuit stated that, "By alleging that they are being subjected to, and their voting power is being affected by, an illegal election scheme that was plainly created because of or on account of race, the Intervenors have adequately stated a claim for a section 2 violation of the Voting Rights Act,"225 F.3d at 1281; the appellate court then added that it "has made clear in *Nipper* and *White* that a district court may not remedy a section 2 violation by changing the size of a county commission." *Id.* And with these statements, the appellate court remanded the case to this court for the plaintiffs to justify the original remedy even though the remedy was based on a finding of intentional discrimination. Notably, because the court remanded only on the one question of whether the court-ordered relief was valid under the Fourteenth Amendment, the court made clear that the challengers had already prevailed to the extent the original relief was based on § 2.

Thus, if the intervenors here can show the same, that is, that the Chilton County settlement to the extent it is based on § 2 is not authorized by § 2, this court must hold that they can recover on their challenge to the settlement to the extent the settlement is based on § 2. To the extent the settlement is based on the Fourteenth Amendment, the plaintiffs must show, as instructed by the Eleventh Circuit in *Baldwin County Comm'n III,* that the relief is appropriate. Here, while the parties admittedly entered into a consent decree, the history of this litigation reflects that the decree was accepted and entered into "on account of race" and was intended to remedy an alleged § 2 violation. The Chilton County consent decree to the extent it was based on § 2 is therefore illegal.

The court recognizes, as aptly pointed out by the plaintiffs here, that the intervenors here have not alleged the "traditional" § 2 claim. They do not allege that they have personally suffered vote dilution because there are seven instead of four commissioners, or that cumulative voting has impaired their equal opportunity to participate fully in the political process and elect the candidate of their choice. The plaintiffs pointedly ask: "Have the ... intervenors demonstrated any violation of their personal rights that warrants vacating the consent decree?" Plaintiffs' brief (Doc. No. 151), at 33. The intervenors allege, and have shown, only that, as a result of the consent decree, Chilton County Commission now uses cumulative voting instead of at-large voting to elect its commissioners.

But these matters were presented to and resolved by the *Baldwin County Comm'n III* court. There, Circuit Judge Barkett similarly observed that the intervenors there do not "allege that they personally suffer vote dilution because there are seven instead of four commissioners, or that the expanded commission size in any other way impairs their equal opportunity to participate fully in the political process and elect the candidate of their choice." 225 F.3d at 1283 (Barkett, J., concurring). "The only allegation to which the majority opinion points," she continued, "is the Intervenors' assertion that 'the district court intentionally increased the size of the Baldwin County Commission and redrew the district lines specifically in order to create a majority black district.'" *Id.* (citation omitted).

Judge Barkett then concluded that, "This allegation is not sufficient, in my view, to establish a claim under the Voting Rights Act," and that, as a result, "the majority's additional finding that the Intervenors state a claim under Section 2 of the Voting Rights Act is erroneous." *Id.*

Needless to say, Judge Barkett's view was not the view of the majority in *Baldwin County Comm'n III;* indeed, that was the very view this court took in *Baldwin County Comm'n II,* a view that the *Baldwin County Comm'n III* court expressly rejected in holding that the intervenors there had stated a viable § 2 claim.

Until Eleventh Circuit law is changed by the appellate court en banc or by the Supreme Court, to assert a collateral § 2 challenge and put to the test a § 2 remedy based on intentional discrimination, it is sufficient for challengers to allege that "they are being subjected to, and their voting power is being affected by, an illegal election scheme that was plainly created because of or on account of race,"*Baldwin County Comm'n III,* 225 F.3d at 1281; and, to prevail on the remedy to the extent it based on § 2, it is also sufficient merely to show that the remedy, whether court-ordered or by consent decree, is not one of those *authorized* by § 2. *Id.*("a district court may not remedy a section 2 violation by changing the size of a county commission"). In *Baldwin County Comm'n V,* the Eleventh Circuit held that § 2 does not authorize cumulative voting as a remedy for a challenge to an at-large voting scheme, for, as stated, "there is no objective and workable standard for choosing [it as a] reasonable benchmark[ ] over the many forms of government." 376 F.3d at 1264 (internal quotations omitted).

There is still the question of whether the cumulative voting scheme is an appropriate remedy for the Chilton County Commission to the extent the remedy reflected a compromise based on an alleged intentional-discrimination violation of the Fourteenth Amendment. As in *Baldwin County Comm'n IV,* there is no evidence to support the conclusion that the Chilton County Commission intentionally adopted an at-large scheme over cumulative voting for racially discriminatory reasons. *See, e.g., Baldwin County Comm'n IV,* 222 F.Supp.2d at 1289 ("[T]hese [state-wide] findings did not justify the court's conclusion that the Alabama Legislature's enactment of numbered place laws in the 1960's for racially discriminatory reasons tainted the Baldwin County's Commission voting scheme. The 2002 evidence reflects that, in 1931, a law was enacted providing for the four commissioners to be elected at-large but with the county divided into four districts and with one commissioner to reside in each district. As it ends up, the enactment of numbered place laws in the 1960's simply had no effect on how the Baldwin County Commission was elected.").

Finally, the plaintiffs reiterate their argument that intervenors, such as Green and Jones, lack standing. First, they contend "that the standing issue [in] *Baldwin County [Comm'n III]* was wrongly decided." Plaintiffs' brief (Doc. No. 151), at 47. Second, they argue that *Baldwin County Comm'n III's* standing holding is distinguishable. They maintain that the critical "difference is the fact that this Court did not alter Chilton County's 'democratically established system,' "*id.*, but rather that "Chilton County, with the State's blessing, altered the statutory system by agreeing to a consent decree." *Id.* They say that, "All this Court did was to approve and adopt the settlement, finding it to be consistent with the core objectives of the Voting Rights Act and not contrary to public policy." *Id.* The plaintiffs then conclude that, "The intervenors, therefore, are not challenging the federal imposition of the current seven-seat, cumulative voting election system, but the power of Chilton County and the State of Alabama to adopt it through a consent decree without the ... intervenors' personal approval[;] the ... intervenors are making an unprecedented (and absurd) claim to have a personal right to veto the State of Alabama's decision to compromise a voting rights lawsuit, if that compromise entails modifying a legislatively enacted election system." *Id.*

Baldwin County Comm'n III makes unequivocally clear that intervenors have "standing to defend the election scheme to which they were subject when that entire election scheme had been challenged as illegal." 225 F.3d at 1279. None of the nuances with which the plaintiffs seek to layer this language finds any support in the opinion.

Indeed, the plaintiffs' argument here is reminiscent of the one they made in *Baldwin County Comm'n III:* that the action at issue was really state, not federal, that the power being exercised was really state, not federal. In rejecting this argument, the Eleventh Circuit said that, "Activity performed pursuant to a federal court order is not transformed into the exclusive exercise of state power simply because it is performed by state actors who are obeying a federal court injunction." *Baldwin County Comm'n III,* 225 F.3d at 1281. Similarly here, activity performed pursuant to a federal court order is not transformed into the exclusive exercise of state power simply because it is performed by state actors who are obeying a federal court injunction based on a consent decree.

The Eleventh Circuit has spoken on the standing issue as it applies here, and because that "decision binds the district courts sitting within its jurisdiction," *McGinley v. Houston,* 361 F.3d 1328, 1331 (11th Cir.2004), this district court, like it or not, is so bound-"unless and until that holding is overruled [by the circuit] en banc or by the Supreme Court." *Baldwin County Comm'n III,* 225 F.3d at 1280; *see also Baldwin County Comm'n II,* 53 F.Supp.2d at 1270 n. 7 (While "[r]ecent Supreme Court cases ... cast doubt on the [ ] intervenors' standing to bring this case not only under the tenth amendment but also under the eleventh amendment and the Voting Rights Act as well[, t]he court ... considers itself bound by ... circuit cases until that precedent has been expressly overruled by or is irreconcilable with a subsequent decision of the Supreme Court or the Eleventh Circuit sitting en banc.").

An appropriate judgment will be entered.

JUDGMENT

In accordance with the memorandum opinion entered today, it is the ORDER, JUDGMENT, and DECREE of the court that:

(1) All outstanding remedial orders and judgments restructuring the Chilton County Commission are vacated.

(2) All requests for the court to change the way in which the Chilton County Commission is elected different from the one that existed before the 1988 injunction are denied.

(3) The defendants are submit to the court, within 14 days, a plan providing as soon as is feasible for the election of county commissioners under an election scheme that is completely free of the 1988 injunction.

(4) The court retains jurisdiction for the limited purpose of supervising the undoing of the 1988 injunction.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JOHN DILLARD, *et al.*,)
)
Plaintiffs,)
)
)
ROBERT R. BINION, *et al.*,)
)
Plaintiff-Intervenors,)
)
GILBERT GREEN, *et al.*,)
)
Plaintiff-Intervenors,)
)
v.)
)
CHILTON COUNTY COMMISSION, *et al.*,)
)
Defendants.)

Filed
March 8, 2004
Clerk
U.S. District Court
Middle Dist. of Ala.

Civil Action No.
87-T-1179-N

ORDER ON PRETRIAL HEARING

A pretrial hearing occurred in this case on February 19, 2004, wherein the following proceedings were held and actions taken:

1. PARTIES AND TRIAL COUNSEL

For the Dillard Plaintiffs and the Binion Plaintiff-Intervenors: James U. Blacksher. Possible additional trial counsel are Edward Still, Janai Nelson, and Pamela S. Karlan;

For the Green Plaintiff-Intervenors: Algert S. Agricola, Jr. and Albert L. Jordan.

For the Defendant Chilton County Commission and the Defendant Chilton County Probate Judge Robert M. Martin: John Hollis Jackson, Jr., Dorman Walker, and David R. Boyd;

For Defendant State of Alabama: John J. Park, Jr.

Counsel Appearing at Pretrial Hearing:

For the Dillard Plaintiffs and the Binion Plaintiff-Intervenors: James U. Blacksher and Edward Still;

For the Green Plaintiff Intervenors: Algert S. Agricola, Jr., and Albert L. Jordan;

For Defendant Chilton County Commission and Defendant Chilton County Probate Judge Robert

M. Martin: John Hollis Jackson, Jr., and Dorman Walker.

For Defendant State of Alabama: John J. Park, Jr.

2. JURISDICTION AND VENUE:

Jurisdiction was originally based upon 28 U.S.C. §§ 1331, 1343. Venue in the Middle District of Alabama is proper.

3. PLEADINGS:

Plaintiff-Intervenor Green's Complaint

Answer of defendant Chilton County Commission and Probate Judge to Green intervenors complaint

Plaintiffs' response to motion to intervene

Plaintiffs' motion for summary judgment

Plaintiffs' correction to motion for summary judgment

4. CONTENTIONS OF THE PARTIES:

(a) The Dillard plaintiffs and Binion and Wright plaintiffs-intervenors:

1. Plaintiffs are entitled to summary judgment, and the Green intervenors' complaint in intervention should be dismissed. *Frew v. Hawkins*, 124 S.Ct. 899 (2004).

2. The 1988 consent decree does not violate the Tenth or the Eleventh Amendment, regardless of whether the remedy agreed to exceeds the relief this Court could have ordered in 1988 or could now order following adjudication of plaintiffs' claims.

3. The State of Alabama is a party to this action, because it was consolidated with CA No. 85-T-1332, and the Attorney General of Alabama is lead counsel for defendant Chilton County Commission as a former member of defendant subclass B.

4. The State waived all defenses under the Tenth and Eleventh Amendments when it entered into the 1987 interim consent decree and when it approved the 1988 Chilton County Commission consent decree.

5. Intervenors Green and Jones lack Article III standing to assert defenses or to seek Rule 60 relief based on the Tenth and Eleventh Amendments.

6. Intervenors Green and Jones have failed to plead or to adduce evidence upon which relief could be granted them based on their claims under the Voting Rights Act and the Fourteenth Amendment.

7. Intervenors Green and Jones lack Article III standing to assert defenses or to seek Rule 60 relief based on the alleged racial classification with respect to the selection of the commission chief, because Green and Jones have not alleged and cannot show that they personally have been the subjects of the alleged racial classification, or that they personally have been injured by it.

8. The remedies agreed to in the 1988 Chilton County Commission consent decree spring from, and serve to resolve, a dispute within this Court's subject-matter jurisdiction; they come within the general scope of the case made by the pleadings; and they further the objectives of the Voting Rights Act and the Fourteenth and Fifteenth Amendments, upon which the amended complaint in 85-1332 was based.

9. The absence of home rule provisions for counties in the 1901 Constitution is the result of intentional racial discrimination in the adoption and maintenance of said constitution.

10. The failure or refusal of the Chilton County Commission and the Alabama Legislature to adopt the 1988 consent decree plan in state law is tainted with racially discriminatory intent.

11. The Green intervenors' challenge to the 1988 consent decree plan is motivated by racial discrimination.

12. The Green intervenors lack clean hands to pursue the claims in their complaint.

13. Voting in the Chilton County electorate continues to be racially polarized.

14. The 1988 consent decree plan provides black citizens in Chilton County an equal opportunity to particpate in the policital process leading tot he election of members of the county commission.

15. The election plan for the Chilton County Commission adopted as local law in 2003 would dilute and retrogress black voting strength in violation of the rights of plaintiffs and the class they represent under the Fourteenth and Fifteenth Amendments and under §§ 2 and 5 of the Voting Rights Act.

16. If this Court grants any Rule 60 relief with respect to the number of seats on the Chilton County Commission, it should retain the

cumulative voting provision of the 1988 consent decree.

17. The 1988 consent decree plan provides black citizens of Chilton County an equal opportunity to participate in the political process leading to the election of members of the county commission.

b) Contentions of Plaintiff-intervenor Gilbert Green, *et al.*:

1. Defendant Chilton County Commission is the governing body for a subdivision of the State of Alabama. *See* Ala. Code § 11-3-1 *et seq.* (1989); Act No. 51-872, 1951 Ala. Acts 1505 (then titled "Board of Revenue and Control").

2. In accord with the June 1988 Order of this Court, the Commission is currently composed of seven members, each of whom is elected at-large by the cumulative voting system established by order of this Court.

3. Defendant Robert M. Martin, as Probate Judge acting under color of State law, has conducted elections in Chilton County, Alabama for the Chilton County Commission since the entry of this Court's Order in this case in a manner that does not conform to State law.

4. Pursuant to Act No. 26 of the 1970 Alabama legislature, 1970 Ala. Acts 2628 (Spec. Sess.

1970), each county governing body in Alabama became known as that county's commission. *See*, Ala. Code 1975, § 11-1-5. Until the Court's 1988 injunction, the members of the Commission had been elected by the voters of Chilton County from residency districts, at least since 1879. *See* Act No. 177, 1878 Ala. Acts 208.[1]

5. In 1985, John Dillard and other African-American voters (hereafter collectively "Dillard") began the action that resulted in the Order. Dillard asserted that the at-large, numbered-place election features when combined with the majority vote primary requirement of electing members of the Commission violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

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[1] In 1887, the legislature provided for appointment of the four commissioners by the Governor, however, the statute did not go into effect until the expiration of the terms of office of the commissioners then in office. The 1887 statute provided for a six year term of office, but was repealed by a statute enacted in January 1891, and given an effective date in August 1891. A February 1891 statute provided again explicitly for four commissioners elected from residency districts by the voters of Chilton County. The statute provided for the election to occur in August 1892, and a four year term of office to commence a week later. In 1899, the legislature adopted a statute designating the boundaries of the commissioner residency districts, and again provided for four districts. A similar statute, re-designating the districts boundaries, was enacted in 1945, and again provided for four districts.

6. In June 1988, following the filing of a joint motion by the Dillard parties to approve a settlement they reached as to both liability and remedy, the Court entered an Order titled "Consent Decree," which increases the size of the Commission from four to seven members (without the Probate Judge) to be elected at-large, to concurrent terms of four years, using a system with a plurality win and a cumulative vote, notwithstanding the provisions of State law. State law provided then . . . that the Commission should consist of four positions plus the Probate Judge serving as *ex officio* chairman with the four members elected at-large, to staggered terms, from residency districts. Prior to the entry of the Consent Decree, the Court tentatively approved the parties' settlement on an interim basis, directed submission of the plan to the U.S. Attorney General for approval under Section 5 of the Voting Rights Act of 1965, and scheduled and held a hearing to consider objections from members of the Plaintiff class, as provided in Rule 23(e) of the Federal Rules of Civil Procedure. The U.S. Attorney General issued approval under Section 5 of the Voting Rights Act on May 16, 1988. The Order was entered over the objection of several black residents of Chilton County, and they had complained that single member election districts were the proper remedy.

7. With regard to the position of chair of the Commission, the Court's order provides as follows:

> The purpose of chair of the county commission shall be decided by the commission pursuant to such procedures as the commission may for itself determine; provided, however, that the procedures used by the commission for that purpose shall ensure that, if a black citizen is elected to the county commission, he or she shall be offered the opportunity to serve a term as chair of not less than six months duration during each four year term of office. If more than one black citizen is elected to the commission, the proviso herein shall only require that one six month term as chair be guaranteed.

Consent Decree, ¶ 4, p. 2, June 23, 1988.

8. A significant change in the law has occurred since the Court issue its Consent Decree in June, 1988. At the time this Court's injunctive order was issued in 1988, the Supreme Court of the United States had not addressed whether the Voting Rights Act authorized courts to alter the size of a government body, or otherwise provide injunctive relief which established an additional elected official for a government body. In 1994, in the decision in *Holder v. Hall*, 512 U.S. 874 (1994), the Supreme Court held that no reliable benchmark was available for courts to determine the proper size of a local governmental body, in light of the language and

history of the Voting Rights Act. Following the *Holder* decision, the Eleventh Circuit ruled *en banc* that "federal courts may not mandate as a section 2 remedy that a state or political subdivision alter the size of its elected bodies." *Nipper v. Smith*, 39 F.3d 1494, 1532 (11th Cir. 1994)(*en banc*), *cert. denied*, 514 U.S. 1083 (1995)(quoted in *White v. State of Alabama*, 74 F.3d 1058 (11th Cir. 1996)). In 2000, the Eleventh Circuit ruled that Baldwin County voters stated a claim under the Tenth and Eleventh Amendments when they complained about an injunction which increased the size of the Baldwin County Commission from four to seven members in order to elect a black member. *Dillard v. Baldwin County Comm'n*, 225 F.3d1271 (11th Cir. 2000). Although the Court determined that the increase in the size of the Baldwin County Commission was an improper remedy under the Voting Rights Act, the Court remanded the case to this Court for a determination of whether the remedy was authorized under the Fourteenth Amendment, or as a remedy for intentional racial discrimination.

9. In applying the rule of *Johnson v. DeSoto County Bd. of Comm'ns*, 204 F.3d 1335 (11th Cir. 2000), this Court has determined that Plaintiffs failed to establish that the Alabama legislature's chosen size for the Baldwin County Commission was the cause of any unequal electoral opportunity for black voters, acting as a cohesive voting group, in choosing members of the Baldwin County Commission. Thus, no vote dilution, which a court is authorized to remedy, authorized an alteration of the

number of positions chosen for the Commission. The 1988 injunction was dissolved and a return to the method of conducting elections under State law was ordered.

10. The June 1988 Consent Decree of this Court exceeds its authority granted by Congress in the Voting Rights Act, and violates the Tenth and Eleventh Amendments, and should be vacated, to the extent it requires that the Commission be increased from four members to seven members notwithstanding the fact that the parties agreed to the relief provided therein. The parties' consent to the entry of the relief provided in the Consent Decree does not provide a sufficient basis for a court to require structural alterations in the form of government for Chilton County, Alabama.

11. Defendant Probate Judge Martin acting in his official capacity, has conducted elections for members of the Chilton County Commission in the manner required of him by the Consent Decree, despite the requirements of state law.

12. The June 1988 Consent Decree of this Court exceeds its authority granted by Congress under the Voting Rights Act, and violates the Tenth and Eleventh Amendments, and should be vacated, to the extent that it requires that someone other than the Probate Judge of Chilton County, Alabama to serve as chairman *ex officio* of the Commission. *Wilson v. Minor*, 220 F.3d 1297 (11th Cir. 2000).

13. The parties' consent to the entry of the relief provided in the Consent Decree does not provide a sufficient basis upon which to require structural alterations in the form of government for Chilton County, Alabama.

14. It is no longer equitable that the Consent Decree in this case should have prospective application as to its requirement that the members of the Chilton County Commission be elected at-large using a system with a plurality win and a cumulative vote because cumulative voting is not authorized as a remedy under the Voting Rights Act of 1965.

15. It is no longer equitable that the Consent Decree in this case should have prospective application as to any of its requirements because the Dillard plaintiffs and the Binion plaintiff-intervenors lack standing to enforce the Consent Decree since it is no longer possible to fashion relief in their favor under the Voting Rights Act of 1965.

16. The June 1988 Consent Decree of this Court exceeds its authority granted by Congress under the Voting Rights Act, and violates the Fifth Amendment. Its provisions direct the Commission members to engage in race-based conduct, to the extent that it provides for commissioners to be offered the chair of Commission as set out in paragraph 12 of Green's Complaint in Intervention, on the basis of the race of the commissioner. Such racial provisions are not justified as narrowly tailored, or reasonably

necessary, to achieve any compelling interest in remedying racial discrimination in voting.

17. In approving the proposed consent decree in 1988, this Court noted that the black population of Chilton County was 11.86%. In the view of the of the Court, it was impossible to draw a five or seven single-member district plan which both has a majority black district and satisfies the one-person one vote requirement. *See Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870, 876 (M.D. Ala. 1988).

18. In approving the proposed consent decree, this Court noted that it provided for seven members. The County Commission lacked authority under Alabama law to enter an agreement to increase its size. *See, e.g., Dillard v. Baldwin County Commission*, 833 So. 2d 11 (Ala. 2002)(finding statute authorizing adjustment of court-ordered district boundary lines insufficient to imply authority to establish size).

19. This history of the election procedures used to choose the members of the Chilton County Commission fails to provide a basis for a court order which increases the size from that provided by state statute. Historically, and consistently since the late 19th century, the Commission has been composed of four persons, and the probate judge serving *ex officio* as chair. Any intentional racial discrimination operating in the Alabama legislature did not extend to the size of the Commission.

20. The legislative choice of size has not been maintained on account of race, or for racial reasons, or for the purpose of minimizing black voting strength.

21. In 2003, the Alabama legislature adopted a statute providing for the Chilton County Commission to be composed of persons chosen from four single member election districts, with the judge of probate serving as chair. This statute, Act No. 2003-217, provides for these rules to operate in the election for the members of the County Commission elected in November 2004, and thereafter.

22. By establishing that single member election districts be used, Act No. 2003-217 of the 2003 legislature removes any discriminatory effects to at-large elections, countywide majority vote requirements, and numbered places.

23. The 1988 consent decree should be vacated. The previous consent of the Commission to the decree in 1988 is insufficient to justify its remaining in effect and rearrangement of the voting rights of Chilton County voters. The 1988 decree is based too much on race, without any justifiable basis. If the consent decree is not vacated, it should be modified to require that the probate judge conduct Commission elections from single member election districts as provided by Act No. 2003-217, rather than at-large.

24. The Plaintiffs lack standing to complain about the dilution of their right to vote, as members of a racial group acting cohesively, for the election of a candidate of their choice. In Chilton County, the racial group of the Plaintiffs lack the potential, when acting as a group, to elect a candidate of its choice.

25. The State did not waive in 1987, the rights of Chilton county voters to assert violations of the Tenth or Eleventh Amendments for claims made against the system of electing Chilton County Commission, in an action brought against other local government election systems filed by persons who were not Chilton County voters.

26. The Dillard plaintiffs lack standing to complaint about the Chilton County election system.

27. The Green Intervenors are due an award of attorneys and costs from the probate judge and the Commission.

(c) Contentions of the Chilton County Commission and Probate Judge Robert Martin:

1. Relief should not be entered that creates conflicting obligations between the Commission and the probate Judge.

2. Any relief that is entered should be consistent with 2003 Ala. Act 217, which requires the Commission to be composed of four members elected

from single-member districts, with the Judge of Probate serving as fifth member and chair.

3. Any relief taht imposes single-member district should be consistent with the districts adopted by the Commission on September 25, 2003.

4. The Chilton County Commission and Chilton County Probate Judge have not acted, or failed to act, for racially motivated reasons with regard to the matters before the Court.

(d) Position of the State of Alabama.

1. The State of Alabama denies that it is a proper party to this lawsuit.

2. To the extent that the Dillard Plaintiffs claim that the State waived its Eleventh Amendment immunity or otherwise settled the claims against it some 15 years ago, those actions by the State do not affect the rights of the Green Intervenors.

3. Any settlement by the State can and should be revisited in accordance with Federal Rules of Procedure 60(b)(5) because the law and the supporting facts have changed.

4. Vacating the decree serves a federalism interest because in 2003, the Alabama Legislature passed a law that establishes the size and membership of the Chilton County Commission. That law cannot be enforced until it is precleared,

and the United States Department of Justice will not consider the preclearance submission until the injunction is vacated.

5. To the extent that the 1988 consent judgment changed the size of the Chilton Count Commission as a remedy for violations of Section 2 of the Voting Rights Act, such a change is likely to have been beyond this Court's remedial powers. *See Holder v. Hall*, 512 U.S. 874 (1994); *White v. Alabama*, 74 F.3d 1058 (11th Cir. 1996); *Nipper v. Smith*, 39 F.3d 1494, 1532 (11th Cir. 1994) (*en banc*), *cert. denied*, 514 U.S. 1083 (1995).

6. To the extent that the 1988 consent judgment adopted cumulative voting as a remedy for violations of Section 2 of the Voting Rights Act, such a change is likely to exceed this Court's remedial powers because the remedy does not come from within the confines of Alabama's system of government. *See Nipper v. Smith*.

7. The Dillard Plaintiffs are unable to state a prima facie case under Section 2 of the Voting Rights Act.

8. This Court should apply the causation analysis of *Johnson v. DeSoto County Board of Comm'rs*, 2094 F.3d 1335 (11th Cir. 2000), and consider whether there is a causal connection between discriminatory intent and the inability of the African-American community in Chilton County to elect the candidates of its choice. This Court should apply the same

analysis as it did in *Dillard v. Baldwin County Comm'n*, 222 F. Supp. 2d 1283 (M.D. Ala. 2002). If causation is present, the challenge of the Green Intervenors should be rejected. If causation is lacking, the decree should be vacated.

5. STIPULATIONS BY AND BETWEEN THE PARTIES:

1. Robert Binion, John Wright, Gilbert Green and Calvin Jones are residents, citizens, and qualified voters of Chilton County.

2. Defendant Chilton County Commission is the governing body for a subdivision of the State of Alabama.

3. Defendant Robert M. Martin is the probate judge of Chilton County, and is responsible for the supervision and implementation of election laws in Chilton County, including directing the process of preparing the form of ballots used for election of members of the Chilton County Commission, training poll workers, receiving and tabulating votes, and certifying the results of the election using the cumulative voting system established by this Court's order.

4. Pursuant to Act No. 872 of the 1951 Alabama legislature, 1951 Ala. Acts 1505, the Chilton County Board of Revenue and Control is to be composed of four persons, elected at-large from Chilton County, from residency districts, with staggered terms.

Under State law, the Probate Judge of Chilton County serves as chairman *ex officio* of the Commission.

6. Furthermore, it is ORDERED that:

(1) The nonjury trial of this cause, which is to last three days, is set for July 8, 2004, at 10:00 a.m., in the second floor courtroom of the Frank M. Johnson, Jr., Federal Building and United States Courthouse in Montgomery, Alabama;

(2) The parties are to file their pre-trial briefs by July 1, 2004;

(3) Each party shall have available at the time of trial, for use by the court (the judge, the courtroom deputy Clerk, and the law clerk), three copies of the list of his or her exhibits;

(4) At least three days before trial, counsel are to contact the courtroom deputy clerk about the procedures for pre-marking all trial exhibits;

(5) Each party shall have available a sufficient number of copies of each photostatically reproducible exhibit for opposing counsel, the courtroom deputy clerk, the law clerk, and the judge; and

(6) All understandings, agreements, and stipulations contained in this pretrial order shall be binding on all parties unless an objection is noted and filed with the court within seven (7) days from the date of this order.

DONE this the 8th day of March, 2004.

/s/Myron H. Thompson
Myron H. Thompson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JOHN DILLARD, *et al.*,)
)
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Plaintiffs,)
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ROBERT R. BINION, *et al.*,)
)
Plaintiff-
Intervenors,)
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)
)
)
GILBERT GREEN,)
CALVIN JONES, JR.,)
)
Plaintiff-Intervenors,)
)
v.)
)
CHILTON COUNTY)
COMMISSION;)
PROBATE JUDGE)
ROBERT B. MARTIN,)
in his official capacity,)
)
Defendants.)

Filed
Sep-4, 2003
Clerk
U.S. District Court
Middle Dist. of Ala.

Civil Action No.
87-T-1179-N

ANSWER OF THE CHILTON COUNTY COMMISSION AND PROBATE JUDGE ROBERT B. MARTIN

Defendants the Chilton County Commissioner and Probate Judge Robert M. Martin, (hereinafter collectively referred to as "the Commission"), answer the Complaint in Intervention for Declaratory and Injunctive Relief filed by intervenors Gilbert Green and Calvin Jones, Jr., (hereinafter collectively referred to as "the Green Intervenors") as follows:

FIRST DEFENSE

In response to the numbered paragraphs of the Complaint in Intervention, the Commission answers as follows:

1. Admitted that the Green Intervenors seek the relief claimed.

Jurisdiction and Venue

2. Admitted that the Court has subject matter jurisdiction.

3. Admitted that venue is proper.

Parties

4. Admitted.

5. Admitted.

6. Admitted that Green and Jones are residence, citizens, and qualified voters of Chilton County, and that they claim to be adversely affected

by the Consent Decree in the manner asserted in paragraph 6.

7. Admitted.

8. Admitted.

Factual Background

9. Admitted.

10. Admitted.

11. Admitted, except as to what state law continues to provide. Act 2003-217 requires the 2004 elections for the Chilton County Commission to be elected from four single-member districts, and further requires the Judge of Probate to serve as Chair of the Commission.

12. Admitted.

Count I

Violation of the Voting Rights Act, and the 10th and 11th Amendments

13. The Commission incorporates by reference its response to paragraphs 1 through 12.

14. Admitted.

15. Admitted.

16. Admitted.

17. Admitted that Probate Judge Martin acting in his official capacity has conducted elections for members of the Chilton County Commission in the manner required of him by the Consent Decree.

Count II

Violation of the Voting Rights Act, and the 10th and 11th Amendments

18. The Commission incorporates by reference its responses to paragraphs 1 through 17.

19. Admitted.

20. Admitted that Probate Judge Martin acting in his official capacity has conducted elections for members of the Chilton County Commission in the manner required of him by the Consent Decree.

Count III

FRCP 60(b)(5) Relief as to Cumulative Voting

21. The Commission incorporates by reference its responses to paragraphs 1 through 21.

22. Admitted.

23. Admitted that Probate Judge Martin acting in his official capacity has conducted elections

for members of the Chilton County Commission in the manner required of him by the Consent Decree.

Count III

FRCP 60(b)(5) Relief for Lack of Standing

24. The Commission incorporates by reference its responses to paragraphs 1 through 23.

25. Admitted.

26. Admitted that Probate Judge Martin acting in his official capacity has conducted elections for members of the Chilton County Commission in the manner required of him by the Consent Decree.

Count V

Violations of 14th Amendment

27. The Commission incorporates by reference its responses to paragraphs 1 through 26.

28. Admitted.

29. Admitted that Probate Judge Martin acting in his official capacity has conducted elections for members of the Chilton County Commission in the manner required of him by the Consent Decree.

SECOND DEFENSE

The Commission denies every averment of the Green Intervenors' Complaint in Intervention taht it has not admitted specifically.

Respectfully submitted on September 4, 2003.

/s/ Dorman Walker
One of counsel for defendants the Chilton County Commission and Chilton County Probate Judge Robert B. Martin

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above and foregoing pleading by depositing a copy of same in the United States Mail, first-class postage prepaid and properly addressed to the following:

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Done on this the 4th day of September, 2003.

/s/ Dorman Walker
Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JOHN DILLARD, *et al.*,)
)
)
Plaintiffs,)
)
ROBERT R. BINION, *et al.*,)
)
Plaintiff-Intervenors,)
)
)
GILBERT GREEN,)
CALVIN JONES, JR.,)
)
Plaintiff-Intervenors,)
)
vs.)
)
CHILTON COUNTY)
COMMISSION; PROBATE)
PROBATE JUDGE)
ROBERT B. MARTIN,)
in his official capacity,)
)
Defendants.)

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2003 Feb 21 A 10:57
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Clk
US District Court
Middle District

Civil Action No.
87-T-1179-N

COMPLAINT IN INTERVENTION
FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff-Intervenors Gilbert Green and Calvin Jones, Jr. (hereinafter "the Green Intervenors") seek relief against the Probate Judge of Chilton County, Alabama to prevent him from conducting elections in a manner which violates the constitutional and statutory rights of Chilton County voters. The Green Intervenors seek relief from an order of this Court which has required, since 1988, an increase in the number of persons who hold positions on the Chilton County Commission (hereinafter the "Commission") from four to seven members to be elected under a "cumulative voting" system. Further, the Green Intervenors seek relief from the order or this Court which bars the duly elected judge from performing his duties as chair of the Commission. To the extent needed to under the effects of the Court's previous order, the Green Intervenors seek an order requiring a restorative special election to fill the positions on the Commission in the manner provided by the Alabama legislature, that is, four person elected at-large by the voters of Chilton County from four residency districts, with staggered terms.

Jurisdiction and Venue

2. The claims made by the Green Intervenors arise under the Tenth Amendment, the Eleventh Amendment, the Fourteenth Amendment to the Constitution of the United States, and the Voting Rights Act of 1965, 42 U.S.C. §§ 1971 *et seq.* The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. The relief sought is authorized pursuant to 42 U.S.C. §§ 1983 and 1988, as well as U.S.C. §

2201 *et seq.* and Rule 60 of the Federal Rules of Civil Procedure.

3. Venue is proper in this district because one or more of the material defendants to the original action resides in this district.

Parties

4. Plaintiff John Dillard is one of the original plaintiffs who filed this action, and who was designated as representative of black voters, including those in Chilton County. He is not seeking relief in this complaint in intervention. He is named because of his status as a plaintiff in the original action.

5. Plaintiff-Intervenors Robert R. Binion and John Wright (hereinafter "the Binion Plaintiff-Intervenors") sought to intervene as Plaintiffs and Chilton County residents on May 31, 1988. They are not seeking relief in this complaint in intervention. They are named because of their status as plaintiff-intervenors in the original action.

6. Plaintiff-Intervenors Gilbert Green and Calvin Jones, Jr. are residents, citizens, and qualified electros of Chilton County, Alabama. They are adversely affected by the increase in the number of members of the Commission, by the change of the method of electing county commissioners, from the method established by the Alabama legislature, to the cumulative voting system currently utilized

under the Order of this Court entered in this case on June 23, 1988, by the removal of the Probate Judge of Chilton County, Alabama from his position as chairman *ex officio* of the Commission, and by the imposition of a racial quota in the selection of the chairman of the Commission as more particularly set out hereinafter in paragraph 12. They assert a federally protected interest in maintaining the democratically-established form of his county government. They have authority under State law to challenge the usurpation of official authority.

7. Defendant Chilton County Commission is the governing body for a subdivision of the State of Alabama. *See* Ala. Code § 11-3-1 *et seq.* (1989); Act No. 51-872, 1951 Ala. Acts 1505 (then titled "Board of Revenue and Control"). In accord with the June 1988 Order of this Court, the Commission is currently composed of seven members, each of whom is elected at-large by the cumulative voting system established by order of this Court.

8. Defendant Robert M. Martin is the probate judge of Chilton County, and is responsible for the supervision and implementation of election laws in Chilton County, including directing the process of preparing the form of ballots used for election of members of the Chilton County Commission, training poll workers, receiving and tabulating votes, and certifying the results of the election using the cumulative voting system established by this Court's order. Defendant Robert M. Martin, as Probate Judge acting under color of

State law, has conducted elections in Chilton County, Alabama for the Chilton County Commission since the entry of this Court's Order in this case in a manner that does not conform to State law. The Green Intervenors also joined Defendant Martin, in his official capacity, by this complaint in intervention in order to effectuate complete relief that this Court may order.

Factual Background

9. Pursuant to Act No. 872 of the 1951 Alabama legislature, 1951 Ala. Acts 1505, the Chilton County Board of Revenues is to be composed of four persons, elected at-large from Chilton County, from residency districts, with staggered terms. Under State law, the Probate Judge of Chilton County serves as chairman *ex officio* of the Commission. Pursuant to Act No. 26 of the 1970 Alabama legislature, 1970 Ala. Acts 2628 (Spec. Sess. 1970), each county governing body in Alabama became known as that county's commission. *See*, Ala. Code 1975, § 11-1-5. Until the Court's 1988 injunction, the members of the Commission had been elected by the voters of Chilton County for residency districts, at least since 1879. *See* Act No. 177, 1878 Ala. Acts 208.[1]

---

[1] In 1887, the legislature provided for appointment of the four commissioners by the Governor, however, the statute did not go into effect until the expiration of the terms of office of the commissioners then in office. The 1887 statute provided for a six year term of office, but was repealed by a statute enacted in

10. In 1985, John Dillard and other African-American voters (hereafter collectively "Dillard") began the action that resulted in the Order. Dillard asserted that the at-large, numbered-place election features when combined with the majority vote primary requirement of electing members of the Commission violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. They joined these claims against the Commission with claims pending, or already adjudicated, against Crenshaw County, and other county governments. *See Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986).

11. In June 1988, following the filing of a joint motion by the then-existing parties to approve a settlement they reached as to both liability and remedy, the Court entered an Order titled "Consent Decree," which increases the size of the Commission from four to seven members (without the Probate Judge) to be elected at-large, to concurrent terms of four years, using a system with a plurality win and a cumulative vote, notwithstanding the provisions of State law. State law provided then, and continues to

---

January 1891, and given an effective date in August 1891. A February 1891 statute provided again explicitly for four commissioners elected from residency districts by the voters of Chilton County. The statute provided for the election to occur in August 1892, and a four year term of office to commence a week later. In 1899, the legislature adopted a statute designating the boundaries of the commissioner residency districts, and again provided for four districts. A similar statute, re-designating the districts boundaries, was enacted in 1945, and again provided for four districts.

provide, that the Commission should consist of four positions plus the Probate Judge serving as *ex officio* chairman with the four members elected at-large, to staggered terms, for residency districts. Prior to the entry of the Consent Decree, the Court tentatively approved the parties' settlement on an interim basis, directed submission of the plan to the U.S. Attorney General for approval under Section 5 of the Voting Rights Act of 1965, and scheduled and held a hearing to consider objections from members of the Plaintiff class, as provided in Rule 23(e) of the Federal Rules of Civil Procedure. The U.S. Attorney General's issued Section 5 approval on May 16, 1988.

12. With regard to the position of chair of the Commission, the Court's order provides as follows:

> The position of chair of the county commission shall be decided by the commission pursuant to such procedures as the commission may for itself determine; provided, however, that the procedures used by the commission for that purpose shall ensure that, if a black citizen is elected to the county commission, he or she shall be offered the opportunity to serve a term as chair of not less than six months duration during each four year term of office. If more than one black citizen is elected to the commission, the proviso herein shall only require that

one six month term as chair be guaranteed.

Consent Decree, ¶ 4, p. 2, June 23, 1988.

COUNT I:

VIOLATION OF THE VOTING RIGHTS ACT, THE TENTH AMENDMENT, AND THE ELEVENTH AMENDMENT

13. The Green Intervenors incorporate by reference paragraphs 1 through 12 of this Complaint in Intervention as if fully set forth herein.

14. A significant change in the law has occurred since the Court issued its Consent Decree in June, 1988.

15. At the time this Court's injunctive order was issued in 1988, the Supreme Court of the United States had not addressed whether the Voting Rights Act authorized courts to alter the size of a government body, or otherwise provide injunctive relief which established an additional elected official for a government body. In 1994, in the decision in *Holder v. Hall*, 512 U.S. 874 (1994), the Supreme Court held that no reliable benchmark was available for courts to determine the proper size of a local governmental body, in light of the language and history of the Voting Rights Act. Following the *Holder* decision, the Eleventh Circuit ruled *en banc* that "federal courts may not mandate as a section 2 remedy that a state or political subdivision alter the

size of its elected bodies." *Nipper v. Smith*, 39 F.3d 1494, 1532 (11th Cir. 1994)(*en banc*), *cert. denied*, 514 U.S. 1083 (1995)(quoting in *White v. State of Alabama*, 74 F.3d 1058 (11th Cir. 1996)). In 2000, the Eleventh Circuit ruled that Baldwin County voters stated a claim under the Tenth and Eleventh Amendments when they complained about an injunction which increased the size of the Baldwin County Commission from four to seven members in order to elect a black member. *Dillard v. Baldwin County Comm'n*, 225 F.3d 1271 (11th Cir. 2000). Although the Court determined that the increase in the size of the Baldwin County Commission was an improper remedy under the Voting Rights Act, the Court remanded the case to this Court for a determination of whether the remedy was authorized under the Fourteenth Amendment. In applying the rule of *Johnson v. DeSoto County Bd. of Comm'ns*, 204 F.3d 1335 (11th Cir. 2000), this Court determined that Plaintiffs failed to establish that the Alabama legislature's chosen size for the Baldwin County Commission was the cause of an unequal electoral opportunity for black voters, acting as a cohesive voting group, in choosing members of the Baldwin County Commission. Thus, no vote dilution, which a court may remedy, justifies as alteration of the number of positions chosen for the Commission. The 1988 injunction was dissolved and a return to the method of conducting elections under State law was ordered. *Dillard v. Baldwin County Comm'n*, 2002 U.S. Dist. LEXIS 17784 (M.D. Ala. Sept. 3, 2002).

16. The June 1988 Consent Decree of this Court exceeds its authority granted by Congress in the Voting Rights Act, and violates the Tenth and Eleventh Amendments, and should be vacated, to the extent it requires that the Commission be increased from four members to seven members, notwithstanding the fact that the parties agreed to the relief provided therein. The parties' consent tot he entry of the relief provided in the Consent Decree does not provide a sufficient basis for a court to require structural alterations in the form of government for Chilton County, Alabama.

17. Acting under color of his State law authority, Defendant Probate Judge martin has conducted elections for members of the Chilton County Commission in a manner that violates the Green Intervenors' constitutional rights.

COUNT II: VIOLATION OF THE VOTING RIGHTS ACT, THE TENTH AMENDMENT, AND THE ELEVENTH AMENDMENT

18. The Green Intervenors incorporate by reference paragraphs 1 through 17 of this Complaint in Intervention as if fully set forth herein.

19. The June 1988 Consent Decree of this Court exceeds its authority granted by Congress in the Voting Rights Act, and violates the Tenth and Eleventh Amendments, and should be vacated, to the extent it requires that someone other than the

Probate Judge of Chilton County, Alabama to serve as chairman *ex officio* of the Commission. *Wilson v. Minor*, 220 F.3d 1297 (11th Cir. 2000). The parties' consent to the entry of the relief provided in the Consent Decree does not provide a sufficient basis upon which to require structural alterations in the form of government for Chilton County, Alabama.

20. Acting under color of his State law authority, Defendant Probate Judge Martin has conducted elections for members of the Chilton County Commission in a manner that violates the Green Intervenors' constitutional rights.

COUNT III:
FED. R. CIV. P. 60(b)(5) RELIEF AS TO CUMULATIVE VOTING

21. The Green Intervenors incorporate by reference paragraphs 1 through 20 of this Complaint in Intervention as if fully set forth herein.

22. It is no longer equitable that the Consent Decree in this case should have prospective application as to its requirement that the members of the Chilton County Commission be elected at-large using a system with a plurality win and a cumulative vote because cumulative voting is not authorized as a remedy under the Voting Rights Act of 1965.

23. Acting under color of his State law authority, Defendant Probate Judge martin has conducted elections for members of the Chilton

County Commission in a manner that violates the Green Intervenors' voting rights.

COUNT IV:
FED. R. CIV. P. 60(b)(5) RELIEF FOR LACK OF STANDING

24. The Green Intervenors incorporate by reference paragraphs 1 through 23 of this Complaint in Intervention as if fully set forth herein.

25. It is no longer equitable that the Consent Decree in this case should have prospective application as to any of its requirements because the Dillard plaintiffs and the Binion plaintiff-intervenors lack standing to enforce the Consent Decree since it is no longer possible to fashion relief in their favor under the Voting Rights Act of 1965.

26. Acting under color of his State law authority, Defendant Probate Judge Martin has conducted elections for members of the Chilton County Commission in a manner that violates the Green Intervenors' voting rights.

COUNT V:
VIOLATION OF FOURTEENTH AMENDMENT

27. The Green Intervenors incorporate by reference paragraphs 1 through 26 of this Complaint in Intervention as if fully set forth herein.

28. The June 1988 Consent Decree of this Court exceeds its authority granted by Congress in the Voting Rights Act, and violates the Fifth Amendment. The provision directs the Commission members to engage in conduct which violates the Equal Protection Clause of the Fourteenth Amendment, and should be vacated, to the extent it provides for commissioners to be offered the chair of Commission as set out in paragraph 12 of this Complaint in Intervention, on the basis of the race of the commissioner. Such racial provisions are not justified as narrowly tailored, or reasonably necessary, to achieve any compelling interest in remedying racial discrimination in voting.

29. Acting under color of his State law authority, Defendant Probate Judge Martin has conducted elections for members of the Chilton County commission in a manner that violates the Green Intervenors' constitutional and voting rights.

WHEREFORE, PREMISES CONSIDERED, the Green Intervenors urges this Court will advance this case on its docket, order a speedy hearing at the earliest practicable date, cause this action to be in every way expedited, and upon such hearing, to:

A. Grant the Green Intervenors a declaratory judgment as follows:

(1) declaring that this Court has jurisdiction over the violations of the U.S. Constitution and the Voting Rights Act by virtue of 42 U.S.C. § 1983 as alleged in the Complaint in Intervention for Declaratory and Injunctive Relief against the Probate Judge preventing him from enforcing the existing election plan for the Commission and to review and issue appropriate orders granting relief from the violations hereinabove alleged;

(2) declaring that the Court's previous Consent Decree is vacated, to the extent it requires the Probate Judge to conduct elections for a seven-member Chilton County Commission instead of a four-member commission;

(3) declaring that the Court's previous Consent Decree is vacated, to the extent it requires the removal of the Probate Judge of Chilton County, Alabama from his role as chairman *ex officio* of the Commission;

(4) declaring that the Court's previous Consent Decree is vacated, to the extent it requires the Probate Judge to conduct elections for members of the Chilton County Commission using an election system with a plurality win with cumulative voting;

(5) declaring that the Court's previous Consent Decree is vacated, because the Dillard Plaintiffs and the Binion Plaintiff-Intervenors lack standing to enforce the Consent Decree since it is not possible to fashion relief in their favor for dilution of their voting strength as a group under the Voting Rights Act of 1965, or the Fourteenth Amendment;

(6) declaring that the Court's previous Consent Decree is vacated, to the extent it requires the imposition of an unlawful racial quota in the selection of the chair of the Commission as set out in paragraph 12 of the Complaint in Intervention.

(7) directing the parties forthwith to submit proposals for a new four-member election plan that this Court can adopt, and scheduling a hearing promptly to consider such proposals. After such hearing, this Court should adopt a plan for the election of the Commission consistent with State and Federal law and order the defendants or other appropriate state or county officers, or their attorneys, to immediately submit the court's plan to the United States Department of Justice for preclearance under Section 5 of the Voting Rights Act.

(8) declaring that the Green Intervenors are prevailing parties for purposes of awarding their attorneys' fees under 42 U.S.C. §§ 1973*l* and 1988.

B. Enter a preliminary injunction

(a) enjoining the Probate Judge of Chilton County from conducting elections for the Commission until a new four-member election plan has been established, and has received any necessary preclearance from the U.S. Attorney General;

C. Once any necessary preclearance has been obtained from the U.S. Attorney General, enter a Final Judgment dissolving the 1988 Consent Decree; and

D. Award the Green Intervenors their court costs and reasonable attorneys' fees pursuant to 42 U.S.C. §§ 1973*l* and 1988.

E. Award such other, further, and different relief as this Court may deem just, proper, or appropriate.

Respectfully submitted this the 21st day of February, 2003.

/s/Albert L. Jordan
Albert L. Jordan

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 21st day of February, 2003, served a copy of the foregoing pleading, on all counsel of record by mailing the same by United States Mail, postage prepaid and properly addressed as follows:

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/s/Albert L. Jordan
Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JOHN DILLARD, ET AL.,

Plaintiffs,

v.

CHILTON COUNTY
COMMISSION

Defendants.

Filed
June 23, 1988
Clerk
U.S. District Court
Middle Dist. of Ala.

CIVIL ACTION
NO. 87-T-1179-N

CONSENT DECREE

Plaintiffs and the Chilton County Commission, Alabama, hereinafter called the defendant, having submitted the following terms of settlement and for good cause shown, it is HEREBY ORDERED that the defendant, its agents, attorneys, employees and those action in concert with them or at their direction, are ENJOINED from conducting the elections for the county commission under the present at-large election system, and are FURTHER ENJOINED as follows:

1. The county commission shall consist of seven members elected at-large, without designated or numbered places and with the seven candidates receiving the most votes being elected. Each voter may cast as many as seven votes which may be allocated amount the candidates as each voter may choose.

2. Elections shall be conducted at the regularly scheduled primary and general elections in 1988. Candidates elected shall continue to have four year concurrent terms.

3. The defendant shall request the local legislative delegation to enact legislation providing for the form of government agreed to herein. This court ordered form of government shall remain in effect only until such legislation is enacted by the legislature and precleared in accordance with the provisions of the Voting Rights Act of 1965.

4. The position of chair of the county commission shall be decided by the commission pursuant to such procedures as the commission may for itself determine; provided, however, that the procedures used by the commission for that purpose shall ensure that, if a black citizen is elected to the county commission, he or she shall be offered the opportunity to serve a term as chair of not less that six months duration during each four year term of office. If more than one black citizen is elected to the commission, the proviso herein shall only require that one six month term as chair be guaranteed.

5. The county commission shall develop and implement a plan to educate the voters about the election system.

6. The plaintiffs are prevailing parties for the purpose of the award of attorneys' fees and expenses. If not resolved by the parties the court will, upon proper motion by any party, set the issues for hearing.

DONE this 23rd day of June, 1988.

/s/Myron S. Thompson
United States District Judge

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Filed
U.S. Court of Appeals
Eleventh Circuit
Nov. 28, 2007
Thomas K. Kahn, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-14950-AA

JOHN DILLARD,
DAMASCUS CRITTENDEN, JR.,
EARWEN FERRELL,
CLARENCE J. JARRELLS,
ULLYSSES MCBRIDE,
LOUIS HALL, JR.

Plaintiffs-Appellants,

ROBERT R. BINION,
JOHN WRIGHT,

Intervenor-Plaintiffs Appellants,
GILBERT GREEN,
et al.,

Intervenor-Plaintiffs-Appellees,

versus

CHILTON COUNTY COMMISSION,
ROBERT B. MARTIN,
Probate Judge,

Defendants-Appellees,

THE STATE OF ALABAMA, et al.,

Defendants.

No. 06-15354-AA

JOHN DILLARD,
DAMASCUS CRITTENDEN, JR. et al,

Plaintiffs,

ROBERT R. BINION, et al.

Intervenor-Plaintiffs,

GILBERT GREEN,
CALVIN JONES, JR.,

Intervenor-Plaintiffs-Appellants,

versus

CHILTON COUNTY COMMISSION

ROBERT B. MARTIN
Probate Judge,

Defendants-Appellees,

THE STATE OF ALABAMA,

Defendant.

Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFLAT, BLACK and EBEL,[**] Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

---

[*] Honorable David M. Ebel, United States Circuit Judge for the Tenth Circuit, sitting by designation.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

ORD-42

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②

FILED
MAY 2 3 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1124

IN THE
Supreme Court of the United States

GILBERT GREEN AND CALVIN JONES, JR.,
Petitioners,
v.
CHILTON COUNTY COMMISSION, *ET AL.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF IN OPPOSITION

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May 23, 2008

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QUESTIONS PRESENTED

This case concerns a challenge to two provisions of a 1988 consent decree governing the composition of the Chilton County (Alabama) Commission. The questions presented are:

1. In light of the district court's recent order deleting the provision of the consent decree governing selection of the Commission chair, is petitioners' claim regarding that provision now moot?

2. Did the court of appeals correctly hold that petitioners lacked standing to challenge the provision regarding the size and method of electing the Commission?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 10

I. PETITIONERS' CHALLENGE TO THE CONSENT DECREE PROVISION REGARDING THE COMMISSION CHAIRMANSHIP IS MOOT 11

II. THE COURT OF APPEALS CORRECTLY HELD, IN LIGHT OF THIS COURT'S DECISION IN *LANCE v. COFFMAN*, THAT PETITIONERS LACK STANDING TO CHALLENGE THE REMAINING PROVISIONS IN THE CONSENT DECREE 14

III. IN THE ABSENCE OF A LIVE CASE BEFORE IT, THE COURT OF APPEALS LACKED THE POWER TO VACATE THE 1988 CONSENT JUDGMENT ON ITS OWN INITIATIVE 20

CONCLUSION 25

APPENDIX 1a

TABLE OF AUTHORITIES

Cases

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 6

Association of Comm. Orgs. for Reform Now (ACORN) v. Edgar, 56 F.3d 791 (7th Cir. 1995) 21, 22

Baker v. Carr, 369 U.S. 186 (1962) 15, 16

Burke v. Barnes, 479 U.S. 361 (1987) 12

Chiles v. Thornburgh, 865 F.2d 1197 (11th Cir. 1989) 9

County of Los Angeles v. Davis, 440 U.S. 625 (1979) 13

Cox Cable Communications, Inc. v. United States, 992 F.2d 1178 (11th Cir. 1993) 9

Diamond v. Charles, 476 U.S. 54 (1986) 6, 17-18

Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972) (per curiam) 12, 13

Dillard v. Baldwin County Comm'n, 53 F. Supp. 2d 1266 (M.D. Ala. 1999), *rev'd*, 225 F.3d 1271 (11th Cir. 2000), *on remand*, 222 F. Supp. 2d 1283 (M.D. Ala. 2002), and 282 F. Supp. 2d 1302 (M.D. Ala. 2003), *aff'd*, 376 F.3d 1260 (11th Cir. 2004) 4, 6

Dillard v. Chilton County Bd. of Educ., 699 F. Supp. 870 (M.D. Ala. 1988), *aff'd*, 868 F.2d 1274 (11th Cir. 1989) 3

Dillard v. Chilton County Bd. of Educ., 1988 U.S. Dist. LEXIS 18249 (M.D. Ala. 1988)..............2

Dillard v. Chilton County Commission, 525 F. Supp. 2d 1315 (M.D. Ala. 2007)....................1, 10

Dillard v. Chilton County Commission, 868 F. 2d 1274 (11th Cir. 1989)...4

Dillard v. Crenshaw County, 640 F. Supp. 1347 (M.D. Ala. 1986)...2

Friends of the Earth, Inc. v. Laidlaw Environ. Servs. (TOC), Inc., 528 U.S. 167 (2000)................16

Fusari v. Steinberg, 419 U.S. 379 (1975) 12

Holder v. Hall, 512 U.S. 874 (1994).................4, 9, 24

Kremens v. Bartley, 431 U.S. 119 (1977)...........12, 13

Lance v. Coffman, 127 S. Ct. 1194 (2007) ....passim

Lewis v. Casey, 518 U.S. 343 (1996)........................16

Lewis v. Continental Bank Corp.,494 U.S. 472 (1990)...12

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)..15

Massachusetts v. EPA, 127 S. Ct.1438 (2007) 14

Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) (en banc), *cert. denied*, 514 U.S. 1083 (1995)...5, 9, 24

Raines v. Byrd, 521 U.S. 811 (1997)..........................6

Thornburg v. Gingles, 478 U.S. 30 (1986)................16

United States v. Hays, 515 U.S. 737 (1995)...............6

United States v. Pauley, 321 F.3d 578 (6th Cir.), *cert. denied*, 540 U.S. 877 (2003) 23, 24

Whitcomb v. Chavis, 403 U.S. 124 (1971) 16

White v. Alabama, 74 F. 3d 1058(11th Cir. 1996) 5

Constitutional Provisions

U.S. Const., Art. I, § 4 ....7, 15

U.S. Const., Art. III 6, 14, 15, 20

U.S. Const. amend V 5

U.S. Const. amend XI 5

U.S. Const. amend. X 5, 21

U.S. Const. amend. XIV 5, 8

Statutes

Ala. Act No. 2006-252..3, 19

Ala. Act No. 2007-488..3

Ala. Code § 11-3-1(c)...3, 19

Ala. Code § 11-80-12..1, 3, 18

National Voter Registration Act of 1993,
42 U.S.C. §§ 1973gg *et seq.* 21

Voting Rights Act of 1965, § 2,
42 U.S.C. § 1973.......................................passim

Rules

Fed. R. Civ. P. 1 23

Fed. R. Civ. P 24 8

Fed. R. Civ. P. 60(b)..23, 24

BRIEF IN OPPOSITION

Petitioners seek review of two features of a 1988 consent decree governing the election and structure of the Chilton County (Alabama) Commission. Petitioners' challenge to a provision requiring that black commissioners be given an opportunity to chair the Commission no longer presents a live controversy. Subsequent to the filing of this petition for writ of certiorari, the district court issued an order deleting that provision from the consent decree. *See* BIO App. 1a-2a.[1] Accordingly, that issue is moot, and does not warrant this Court's review.

Nor does petitioners' challenge to the provision increasing the size of the Commission present an issue worthy of this Court's review. Petitioners' claim is unlikely ever to arise anywhere else in light of recent Alabama legislation ratifying every other consent decree increasing the size and changing the method of electing a governing body within the state. *See* Ala. Code § 11-80-12. In light of these developments, the lack of any conflict among the circuits, and the court of appeals' correct application of this Court's recent decision in *Lance v. Coffman*,

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[1] In addition to the opinions reprinted in the petition for writ of certiorari, the district court issued relevant orders and an opinion subsequent to the issuance of the mandate from the court of appeals. The district court's December 10, 2007, order is reported at 525 F. Supp. 2d 1315 and is reprinted in the appendix to this brief in opposition at pages 10a-11a. The district court's April 3, 2008, opinion explaining its modification of the consent decree is reported at 2008 U.S. Dist. Court LEXIS 27287 and is reprinted at pages 3a-9a. The district court's April 3, 2008, order modifying the decree is unreported and is reprinted at pages 1a-2a.

127 S. Ct. 1194 (2007), to the distinctive facts of this case, certiorari should be denied.

STATEMENT OF THE CASE

1. This case originated in 1985, when respondent John Dillard and several other black citizens and voters in Alabama brought suit under section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973, challenging the use of at-large elections to choose members of county commissions in nine Alabama jurisdictions. They alleged that this practice denied black voters an equal opportunity to participate in the political process and to elect representatives of their choice. *See Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986). In light of the district court's finding that the State of Alabama had engaged for nearly a century in extensive intentional racial discrimination in the design, modification, and maintenance of at-large election systems statewide, *see id.* at 1356-60, the Dillard respondents expanded their complaint to challenge the continued use of at-large elections in additional jurisdictions across Alabama. Among these jurisdictions was respondent Chilton County Commission (hereafter "the Commission").[2]

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[2] Originally, the district court certified a defendant class of county commissions, boards of education, and municipal governments, but the court later decertified the class, instead treating each challenge as an individual, albeit consolidated, case. *See Dillard v. Chilton County Bd. of Educ.*, 1988 U.S. Dist. LEXIS 18249 at *1, n. 1 (M.D. Ala. 1988). When the cases were decertified, respondents Robert R. Binion and John Wright intervened as plaintiffs representing the interests of black citizens and voters in Chilton County.

The Commission admitted that its use of at-large elections, under which black voters had had no opportunity to elect commissioners of their choice, violated the Voting Rights Act. *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870, 871 (M.D. Ala. 1988); *see also id.* at 875 (finding that "[t]he at-large system used to elect the Chilton County Commission . . . was a product of this state-wide legislative scheme to deny Alabama black citizens their right of equal access to the state's political process"). In light of this concession of liability and the court's findings, the parties jointly proposed a remedy that increased the size of the county commission from five to seven members and modified the method of conducting at-large elections from one using numbered places and a majority-vote requirement to one using cumulative voting.[3]

After a fairness hearing before a magistrate judge at which both supporters and opponents of the proposed plan testified, the district court approved the proposed remedy in June 1988. *See Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. at 875; *see*

As the district court noted, this case is "the last of the 180 court-ordered election plans still active in the longstanding set of *Dillard* cases" because all the other plans were adopted as an affirmative matter of state law by Ala. Acts No. 2006-252 and 2007-488 (codified at Ala. Code §§ 11-80-12 and 11-3-1(c)). BIO App. 4a-5a.

[3] Cumulative voting was adopted as a remedy in several of the consolidated *Dillard* cases. *See Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. at 876 & n.7.

Originally, the decree also contained a provision dealing with the selection of the commission chairperson, but that provision was subsequently deleted from the decree. *See supra* p. 1; *infra* pp. 11-12; BIO App. 1a-2a.

also Pet. App. 97a-100a (reprinting the consent decree). The district court found that the proposed system would "provide[] black voters in the county with a realistic opportunity to elect candidates of their choice, even in the presence of substantial racially polarized voting." *Dillard*, 699 F. Supp. at 875. The court of appeals affirmed without opinion. *Dillard v. Chilton County Commission*, 868 F.2d 1274 (11th Cir. 1989). The case then entered a "long period of quiescence," Pet. App. 29a, during which the county's voters consistently used the procedure set out in the consent decree to select the members of the Commission.

2. More than a dozen years later, in February 2003, petitioners filed what they styled a complaint in intervention. Pet. App. 79a-95a. Petitioners "[took] their cue," Pet. App. 39a, from a recent collateral challenge to another remedial plan adopted as part of the *Dillard* litigation. See *Dillard v. Baldwin County Comm'n*, 53 F. Supp. 2d 1266 (M.D. Ala. 1999), *rev'd*, 225 F.3d 1271 (11th Cir. 2000), *on remand*, 222 F. Supp. 2d 1283 (M.D. Ala. 2002), and 282 F. Supp. 2d 1302 (M.D. Ala. 2003), *aff'd*, 376 F.3d 1260 (11th Cir. 2004). The *Baldwin County* litigation involved a remedial order that had increased the size of a governing body over the defendant jurisdiction's objection, rather than pursuant to a consent decree. The collateral challenge resulted in the district court's vacating that remedial order in light of intervening decisions by this Court and the court of appeals holding that federal courts lack the power to modify the size of elected bodies to remedy section 2 violations. *See Holder v. Hall*, 512 U.S. 874 (1994); *White v.*

Alabama, 74 F. 3d 1058 (11th Cir. 1996); *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc), *cert. denied*, 514 U.S. 1083 (1995). Petitioners relied on the *Baldwin County* litigation to argue that the consent decree in Chilton County, which had not been imposed over the defendant jurisdiction's objection, also should be vacated.

Petitioners identified themselves as "residents, citizens, and qualified elect[ors] of Chilton County," *id.* at 81a, who were "adversely affected" by the increase in the size of the commission, by the use of cumulative voting, and by the provision regarding selection of the commission chairperson, *id.* They alleged violations of section 2 of the Voting Rights Act and of the Fifth, Tenth, Eleventh, and Fourteenth Amendments.

3. The district court permitted petitioners to intervene. After trial in 2006, the district court entered an order vacating the existing remedial decree in Chilton County. Pet. App. 49a. The court noted that petitioners had not established a "traditional" section 2 claim because they had not proven "that they have personally suffered vote dilution because there are seven instead of four commissioners, or that cumulative voting has impaired their equal opportunity to participate fully in the political process and elect the candidate of their choice." *Id.* at 44a. They had "allege[d], and have shown, only that, as a result of the consent decree, Chilton County now uses cumulative voting instead of at-large voting to elect its commissioners." *Id.*

The district court reiterated its observation that "[r]ecent Supreme Court cases" had "cast doubt" on petitioners' standing "not only under the tenth amendment but also under the eleventh amendment and the Voting Rights Act as well." Pet. App. 48a (quoting *Dillard v. Baldwin County*, 53 F. Supp. 2d at 1270 n.7 (citing *Raines v. Byrd*, 521 U.S. 811 (1997), *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), and *United States v. Hays*, 515 U.S. 737 (1995))). But the district court considered itself bound, "like it or not," Pet. App. 48a, by the contrary approach taken by the Eleventh Circuit in the *Baldwin County* litigation, which had held both that the proposed intervenors had standing to challenge the remedial injunction and that the injunction exceeded the district court's powers under section 2 of the Voting Rights Act.

4. On appeal, the Eleventh Circuit reversed, holding that "in light of recent Supreme Court precedent," petitioners lacked standing to challenge the 1988 consent decree. Pet. App. 2a.

The court of appeals noted that there were two ways in which parties in petitioners' position could establish their standing. First, such parties might "independently fulfill the familiar requisites of injury-in-fact, causation, and redressability" required by Article III. Pet. App. 8a. Second, such parties might "be permitted to 'piggyback' upon the standing of original parties to satisfy the standing requirement." *Id.*; *see also Diamond v. Charles*, 476 U.S. 54, 64 (1986) (describing the concept of piggyback standing). The court of appeals concluded that petitioners failed to satisfy either standard.

With respect to the question whether petitioners had independent standing, the court of appeals determined that petitioners had not shown the required personalized and concrete injury in fact. The court of appeals found dispositive this Court's decision in *Lance v. Coffman*, 127 S.Ct. 1194 (2007) (per curiam), which was announced after the district court had entered its judgment.[4] The plaintiffs in *Lance* challenged Colorado's use of court-ordered (rather than legislatively drawn) congressional districts, arguing that the resulting plan violated the Elections Clause of Art. I, § 4 (which provides in pertinent part that the "Manner" of electing members of the House of Representatives "shall be prescribed in each State by the Legislature thereof"). This Court held that the plaintiffs' claim should have been dismissed for lack of standing:

> [T]he problem with [the plaintiffs'] allegation should be obvious: The only injury plaintiffs allege is that the law – specifically the Elections Clause – has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.

127 S. Ct. at 1198. Petitioners, the Eleventh Circuit noted, had "consistently described their claims in terms that underscore the lack of particularized harm, and they echo the allegations found to be insufficient in *Lance* . . . , fram[ing] their claims not as personal ones, but rather as citizens' claims seeking to force the district court and the County Commission to follow federal law." Pet. App. at 17a.

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[4] The court of appeals received supplemental briefing from the parties on the applicability of *Lance*. *See* Pet. App. 16a n.6.

"The only 'constitutional right' to which [petitioners] advert," the court of appeals remarked, "is the putative rights shared by all citizens to be governed by their 'democratically chosen form of local government.'" *Id.* at 19a (quoting petitioners' brief). Since petitioners did not "seriously argue" that the consent decree "constitutes an affirmative violation of § 2 of the Voting Rights Act" and "expressly disclaim[ed] any injuries based on vote dilution or other, more concrete harms," Pet. App. 20a, the court of appeals held that their alleged injury was "'precisely the kind of undifferentiated, generalized grievance' that the Supreme Court has warned must not be countenanced." Pet. App. 21a-22a (quoting *Lance*, 127 S. Ct. at 1198).[5]

With respect to the availability of piggyback standing, the court of appeals explained that under Eleventh Circuit precedent, while a piggybacking intervenor "need not demonstrate that he has standing in addition to meeting the requirements of Rule 24" of the Federal Rules of Civil Procedure,[6] this "general policy . . . 'presumes that there is a justiciable case into which an individual wants to intervene.'" Pet. App. 23a (quoting *Chiles v. Thornburgh*, 865 F.2d 1197, 1213, 1212 (11th Cir. 1989)). Thus, "when the original parties have settled the claims between them, and the intervenor wishes to challenge the settlement, we have required the intervenor to have independent standing." Pet. App. 24a (citing *Cox Cable Communications, Inc. v. United States*, 992 F.2d 1178 (11th Cir. 1993)).

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[5] The court of appeals also held that petitioners lacked standing to challenge the provision regarding the rotation of the Commission chairmanship because here too petitioners did not claim that their "personally held rights under the Equal Protection Clause" had been violated. Pet. App. 19a n. 9. The court found that this claim "suffer[ed] from the further defect" that it failed to allege that the rotation provision had ever been used or was ever likely to be used in the future. *Id.* at 20a n.9.

[6] The court of appeals noted that the Dillard respondents had conceded that under existing Eleventh Circuit precedent petitioners were entitled to intervene, but the court "offer[ed] no view on the propriety of the Green intervention under the standards imposed by Fed. R. Civ. P. 24(a)." Pet. App. 4a n.3.

In this case, the court of appeals pointed out the absence of any "unsettled adverse claims in litigation between the original parties, either in the district court or on appeal." Pet. App. 25a. The 1988 entry of the consent decree had "ended the adversarial character of the original controversy," *id.*, and the "long period of quiescence which followed the entry of the consent decree" confirmed that the existing dispute between the Dillard respondents and the Commission had been resolved. *Id.* at 29a. Because neither the Dillard respondents nor the Commission sought to reopen the consent decree between them, "there was no existing case or controversy between the Commission and Dillard as to which the Intervenors could ride piggyback." *Id.* at 27a.

In light of its decision that petitioners lacked standing, the court of appeals vacated the district court's orders terminating the 1988 consent decree and remanded the case with instructions to dismiss petitioners' complaint. Pet. App. 33a.[7]

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[7] In light of this disposition, the court of appeals did not reach the question whether the restrictions in *Holder* and *Nipper* on a federal court's power to order unilaterally an increase in the size of a governing body as a remedy for a

5. Petitioners did not seek a stay of the mandate from the court of appeals. Accordingly, on December 6, 2007, the mandate issued and the case returned to the district court. In light of the court of appeals' decision, the district court then entered an order dismissing petitioners' complaint in intervention for lack of standing and reinstating the 1988 consent decree. *Dillard v. Chilton County Commission*, 525 F. Supp. 2d 1315, 1316 (M.D. Ala. 2007); Pet. App. 10a-11a.

Subsequently, the Dillard respondents and the Commission – the only remaining parties before the district court – jointly filed a motion to amend the consent decree to eliminate the race-specific provision governing selection of the Commission chairperson. After notice and a fairness hearing, *see* BIO App. 6a-7a, the district court granted the parties' motion. It concluded that elimination of the provision, which had never been used, *id.* at 9a, would serve the public interest "by eliminating an unnecessary racial classification from the consent decree." *Id.* Accordingly, the district court ordered that the provision be deleted. *Id.* at 1a.

REASONS FOR DENYING THE WRIT

Recent decisions by this Court and the district court confirm that this case raises no issues warranting this Court's review. Petitioners' challenge to the race-conscious provision of the consent decree has become moot in light of the district court's recent modification of the consent

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section 2 violation "apply to consent decrees where the form of the relief has been agreed to by the parties." Pet. App. 3a n.2.

judgment. Petitioners lack standing to challenge the provision of the consent decree increasing the size of the Commission in light of this Court's recent decision in *Lance v. Coffman*, 127 S. Ct. 1194 (2007). Finally, the second question presented by the petition was neither raised before nor decided by the courts below, and presents no conflict among the circuits requiring this Court's attention.

I. PETITIONERS' CHALLENGE TO THE CONSENT DECREE PROVISION REGARDING THE COMMISSION CHAIRMANSHIP IS MOOT.

Petitioners' first argument for review focuses on their challenge to paragraph 4 of the 1988 consent decree, Pet. App. 98a, which contained a provision governing how the chair of the Chilton County Commission would be selected. In particular, petitioners claim that this Court should grant review to hold that they have standing to challenge the inclusion of a "race-specific proviso," BIO App. 9a, designed to ensure that black commissioners would have an opportunity to serve as chairman of the Commission. *See* Pet. Cert. 12-19.

Whatever the merits of petitioners' assertion of standing or their underlying challenge to the race-specific proviso, those questions are now moot. Following the issuance of the mandate from the court of appeals, the district court deleted that proviso from the consent decree, BIO App. 1a, finding that "[t]he public interest will be served by eliminating an unnecessary racial classification from the consent decree." BIO App. 9a. Because "[t]here is no provision in Alabama law" that would authorize taking race into account in selecting the chair of a county commission, *see* BIO App. 6a, there is no possibility that such a provision will be reinstated. Given that the race-specific proviso was never used, BIO App. 9a, and that petitioners' complaint sought only prospective relief, *see* Pet. App. 92a-94a, there is no longer any live controversy over whether the Chilton County Commission must or can take race into account in selecting its chairman.

This Court's decisions make clear that under these circumstances, petitioners' challenge to paragraph 4 is moot and this Court lacks jurisdiction to consider it. To sustain this Court's jurisdiction, "it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990). Rather, this Court "must review the judgment of the [Eleventh Circuit] in light of [Alabama] law as it now stands, not as it stood when the judgment below was entered." *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972) (per curiam); *see also, e.g., Burke v. Barnes*, 479 U.S. 361, 363 (1987); *Kremens v. Bartley*, 431 U.S. 119, 128 (1977); *Fusari v. Steinberg*, 419 U.S. 379, 380, 387 (1975). As the law now stands, petitioners can no longer allege that they are "subject to a classification based solely on race." Pet. Cert. 14. Nor can they allege that a judicial decree currently in force "reserves the office of chairman for a black member." Pet. Cert. 13. And because petitioners can no longer allege that the Chilton County Commission is subject to a "racial quota system," they cannot credibly allege that they are "directly affected by" one. Pet. Cert. 17.

The fact that the consent decree was amended "after the decision below does not save the [petitioners'] claims from mootness." *Kremens*, 431 U.S. at 128. As this Court explained in *County of Los Angeles v. Davis*, 440 U.S. 625 (1979), a case becomes moot when

> (1) it can be said with assurance that "there is no reasonable expectation . . ." that the alleged violation will recur, and
>
> (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

Id. at 631 (internal citations omitted). Both those criteria are satisfied here. Given the deletion of the race-specific proviso from the consent decree and the lack of any authorization for such a provision under Alabama law, petitioners can have no fear that they will be subjected to any race-conscious practice in the future. And because the proviso was never actually invoked, BIO App. 9a, and petitioners sought only prospective remedies, the only relief they seek "is, of course, inappropriate now that the [challenged proviso] has been repealed." *Diffenderfer*, 404 U.S. at 415; *see also Burke*, 479 U.S. at 363. Under these circumstances, any opinion this Court might offer as to whether petitioners have standing to challenge the method by which a county commission selects its chairman would be entirely advisory. Such a challenge does not warrant this Court's review.

II. THE COURT OF APPEALS CORRECTLY HELD, IN LIGHT OF THIS COURT'S DECISION IN *LANCE v. COFFMAN*, THAT PETITIONERS LACK STANDING TO CHALLENGE THE REMAINING PROVISIONS IN THE CONSENT DECREE.

The court of appeals held that petitioners lacked standing to challenge the consent decree because they had alleged nothing more than a generalized grievance shared by all the county's citizens. That holding was clearly correct, is entirely consistent with this Court's decisions, and creates no conflict with the decisions of any other court of appeals.

Under Eleventh Circuit precedent, petitioners might have established their standing in one of two ways. First, they might have independently met the familiar requirements of Article III, including that they had "suffered a concrete and particularized injury." *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007). Second, even if they were unable to show such an injury, they might have been permitted to "piggyback" on the standing of the original parties to the *Dillard* lawsuit, but this piggyback standing would be available only if, at the time they sought to intervene, Pet. App. 30a, there was an ongoing, justiciable controversy between the original parties, Pet. App. 24a.

1. The court of appeals correctly applied this Court's intervening decision in *Lance v. Coffman*, 127 S. Ct. 1194 (2007) (per curiam), to the question whether petitioners could satisfy the concrete and

personalized injury-in-fact prong of the test for independent standing. In *Lance*, this Court confronted a challenge to Colorado's decision to use a congressional redistricting plan developed by a state court rather than a plan later developed by the state legislature. The plaintiffs claimed that that decision violated the Elections Clause of Article I, § 4, which provides, in pertinent part, that the "Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the *Legislature* thereof." (Emphasis added).

This Court held that the plaintiffs lacked standing. It reiterated its consistent position that "a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." 127 S. Ct. at 1196 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992)). And it found that the plaintiffs' allegation that "the law – specifically the Elections Clause – has not been followed" was "precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." 127 S. Ct. at 1198. The Court contrasted cases like *Lance* with its earlier decision in *Baker v. Carr*, 369 U.S. 186, 207-08 (1962), where the voters challenging an apportionment that produced districts with vastly different populations alleged that their votes were being diluted "vis-à-vis voters" in less populous districts.

As the court of appeals correctly found here, petitioners "expressly disclaim[ed] any injury based on vote dilution," Pet. App. 20a, the type of claim that conferred standing in *Baker* (involving allegations of quantitative vote dilution), *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (involving allegations of racial vote dilution under the equal protection clause), and *Thornburg v. Gingles*, 478 U.S. 30 (1986) (involving allegations of racial vote dilution under section 2 of the Voting Rights Act), *see* Pet. App. 15a-16a. Instead, petitioners "assert[ed] only the generalized incompatibility of the consent decree with the rights of all citizens in the county to be free of judicial interference . . . with the democratically selected form of local governance." *Id.* at 17a.

Petitioners seek to avoid the clearly correct conclusion that their claims simply "echo the allegations found to be insufficient in *Lance*," *id.*, by pointing to those aspects of their complaint that alleged the use of an unconstitutional racial classification in the selection of the Commission chair. *See* Pet. Cert. 13-14, 16-19. But even if those allegations would have been sufficient to confer standing to challenge the now-superseded race-specific proviso of paragraph 4, *see supra* pp. 11-13 (explaining why that challenge is now moot), they provide no basis for challenging the race-neutral increase in the size of the Commission and the use of cumulative voting rules. Petitioners must prove their standing with respect to each of the provisions they seek to challenge. *Lewis v. Casey*, 518 U.S. 343, 358 (1996) ("standing is not dispensed in gross" but must be satisfied as to each practice about which a plaintiff complains); *see Friends of the Earth, Inc. v.*

Laidlaw Environ. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000) ("a plaintiff must demonstrate standing separately for each form of relief sought"). Nothing in their petition shows any way in which petitioners have suffered a particularized or concrete injury with respect to the consent decree's increase in the size of the Commission.[8] Particularly given that petitioners do not allege any uncertainty or conflict in the lower courts, the Eleventh Circuit's correct application of *Lance* to the facts of this case does not warrant this Court's review.

2. The court of appeals' conclusion that petitioners had not established piggyback standing is even less worthy of this Court's review.[9] The availability of piggyback standing depends on there being some live, ongoing litigation on which to piggyback. As this Court noted in *Diamond v.*

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[8] Because elections under the 1988 consent decree remain at large – cumulative voting simply changes the way in which voters cast their ballots – the weight of every citizen's vote in Chilton County is mathematically equal to the weight of every other citizen's vote. Thus, even if under some circumstances a plaintiff could claim dilution of the weight of his vote if the size of an elected body were increased – so that, for example, he now participated in electing one of seven representatives rather than one of four – that claim is not available in this case to challenge an at-large cumulative voting plan.

[9] As the court of appeals noted, there is a conflict among the circuits as to the availability of piggyback standing for proposed intervenors who cannot independently show their standing. *See* Pet. App. 25a n.11. But because the Eleventh Circuit has taken the liberal approach, this case does not provide an appropriate vehicle for resolving that conflict: petitioners have already received the benefit of the more intervention-friendly rule, and even under that rule, they fail to satisfy the prerequisites for piggyback standing.

Charles, 476 U.S. 54 (1986), where a pediatrician whose own conduct was not implicated by Illinois' abortion statute had intervened in the district court to defend the constitutionality of the statute, an intervenor's "ability to ride 'piggyback' on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no case for [the intervenor] to join." *Id.* at 64. Here, the court of appeals found that there was no live controversy between the original parties to this lawsuit – namely, the Dillard respondents and the Commission. Indeed, the court noted that the Commission "scrupulously avoided" reviving any controversy. Pet. App. 31a. Given that clearly correct and factbound determination, petitioners cannot circumvent the requirement of proving the concrete and particularized injury they failed to allege in their complaint or to prove at trial. *See* Pet. App. 44a.

3. In any event, petitioners' challenge to the provision of the 1988 consent decree that increased the number of members on the Chilton County Commission may well be moot. In 2006 and 2007, the State of Alabama enacted legislation that categorically ratifies, as a matter of state law, existing federal court orders setting the size or method of electing most county commissions. Ala. Code § 11-80-12 provides that any county commission (or board of education or municipal governing body) "whose currently serving members have been elected by a method of election and a specific number of seats prescribed by a federal court shall retain that manner of election and composition"

until such time as new legislation is adopted. That provision itself does not apply to the Chilton County Commission.[10] But "an even broader statutory provision," BIO App. 5a, Ala. Code § 11-3-1(c), provides, in pertinent part that "[u]nless otherwise provided by local law, *by court order,* or governed by Section 11-80-12," county commissions in Alabama shall be "composed of the judge of probate, who shall serve as chairman, and four commissioners." (Emphasis added). The plain language of section 11-3-1(c) covers the Chilton County Commission, and arguably ratifies as a matter of state law, the adoption of a seven-member commission pursuant to the 1988 consent decree, rendering petitioners' challenge moot.[11] Because mootness goes to this Court's jurisdiction, *see supra* pp. 12-13, the Court would have to resolve that issue – which turns on a series of questions of state law – before ever reaching the question presented by the petition. To the extent that the question of standing to challenge these sorts of provisions in consent decrees involves an important issue worthy of this Court's review, another case will surely arise that raises the issue unencumbered by a potentially fatal jurisdictional defect.

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[10] Section 11-80-12, enacted by Ala. Act 2006-252, specifically excluded "any county where there is currently pending litigation, or appeals relating thereto, challenging previous court orders or consent orders." On the effective date of Act 2006-252, this lawsuit was pending. To the best of respondents' knowledge, the Chilton County Commission is the *only* governing body to which this exemption applies.

[11] The current version of section 11-3-1 (c) was amended by Ala. Act 2007-488, whose effective date was September 1, 2007, eleven days after the court of appeals' decision vacating the district court's orders terminating the consent decree, *see* Pet. App. 1a. Thus, the 1988 consent decree arguably constitutes a court order exempting the Chilton County Commission from the default rules governing the size and composition of county commissions.

III. IN THE ABSENCE OF A LIVE CASE BEFORE IT, THE COURT OF APPEALS LACKED THE POWER TO VACATE THE 1988 CONSENT JUDGMENT ON ITS OWN INITIATIVE.

Petitioners' final argument as to why this Court should grant review rests on their claim that, because the 1988 consent decree's provision increasing the size of the Chilton County Commission exceeded the district court's power, the court of appeals erred in not reaching the merits of that challenge even after it had concluded that petitioners lacked standing. *See* Pet. Cert. 19 ("Both the scope of the 1988 Decree and its impact on local government are features which the Eleventh Circuit should consider on its own. It need not wait for a party with standing to make a proper motion.").

Petitioners' argument simply ignores the basic requisites of Article III, not to mention the structure of the federal judiciary. Federal courts lack the authority to "consider" legal questions "on [their] own." They can decide questions only in the context of live cases or controversies. The court of appeals' holding that petitioners lacked standing was the equivalent of a holding that there was no Article III case or controversy properly pending before it. At that point, the court of appeals could no more reach out to decide that the 1988 Chilton County Commission consent decree was invalid than it could reach out to strike down any of the hundreds of other consent judgments entered during the last quarter century in other voting rights cases throughout the circuit as to which petitioners also lack standing.

To be sure, *district courts* have continuing jurisdiction over consent decrees they have approved. But nothing about that jurisdiction, whatever its scope, gives the courts of appeals a roving warrant to decide the validity of consent decrees without waiting to have adversarial parties before them.

1. Petitioners' assertion that the court of appeals' decision here conflicts with the decision of the Seventh Circuit in *Association of Comm. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791 (7th Cir. 1995), is completely misplaced. *ACORN* involved a lawsuit brought by the United States and several voting rights groups seeking to force the state of Illinois to comply with the National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg *et seq.* The state argued that the NVRA was unconstitutional. The district court disagreed, upheld the Act, and entered a sweeping remedial injunction. *See* 56 F.3d at 793.

The state appealed, reasserting its claim that the NVRA constituted an impermissible interference with state sovereignty under the Tenth Amendment. The Seventh Circuit upheld the Act itself against the Tenth Amendment challenge, *see id.* at 796, but found that the district court's injunction was too sweeping because it "failed to exhibit an adequate sensitivity to the principle of federalism," *id.* at 798. Thus, it ordered that the injunction be modified to remove the offending provision. *Id.*

Petitioners place great emphasis on the fact that the court of appeals reached the propriety of the scope of the injunctive relief "[n]otwithstanding the State's failure to appeal the remedy." Pet. Cert. 21. But the state did appeal the *judgment* of the district court entering an injunction against it. So the *case* was properly before the court of appeals. There is a world of difference between a court of appeals deciding a case in favor of a proper party – as the State of Illinois undeniably was – on the basis of a ground for reversal not urged by that party, *see* 56 F.3d at 796-97 – and the court of appeals deciding a case in favor of a party not properly before the court at all.

Moreover, petitioners are wrong to claim that in *ACORN* the state was "indifferen[t]" to the scope of the injunction, Pet. Cert. 21, or that *ACORN* held that courts of appeals could set aside injunctions "even though those directly affected find them acceptable," Pet. Cert. 22, based on their independent assessment of an injunction's federalism costs. In sharp contrast to this case, *ACORN* involved an appeal by the government bound by the injunction. Illinois clearly objected to the imposition of any injunction at all. As the court of appeals described it, the state had "staked its all on persuading [the court of appeals] that the law on which the injunction was based is unconstitutional," 56 F.3d at 796. If the underlying statute was unconstitutional, then by necessity an injunction enforcing the statute would be unconstitutional as well. Thus, as a functional matter, the state had vigorously contested the remedial injunction.

Here, by contrast, "[t]he Commission itself *never made any claim of its own for judicial relief*" from the consent decree, Pet. App. 27a (emphasis in the original), and "on appeal, the Commission has scrupulously avoided arguing that the district court order vacating the consent decree should be upheld," Pet. App. 31a. Thus, the party with standing (and best situated) to raise a federalism-based challenge to the continued operation of the consent decree chose *not* to invoke the court of appeals' jurisdiction. Nothing in the court of appeals' decision here conflicts with the Seventh Circuit's approach in *ACORN*.

2. Petitioners' final argument as to why this Court should grant review points to an acknowledged conflict among the courts of appeals over whether district courts can grant relief from an existing injunction *sua sponte* under Fed. R. Civ. P. 60(b). To be sure, such a conflict exists. *See United States v. Pauley*, 321 F.3d 578, 581 n.1 (6th Cir.) (describing the split), *cert. denied*, 540 U.S. 877 (2003). But any conflict among the courts of appeals over the operation of Rule 60(b)(6) has literally nothing to do with this case.

First, none of the cases petitioners cite involves the question presented by the petition, which was whether the *Eleventh Circuit* could *sua sponte* modify or vacate the 1988 consent decree. *See* Pet. Cert. i, 19. The plain language of the federal rules of civil procedure provides that they "govern the procedure in all civil actions and proceedings in the United States *district courts*." Fed. R. Civ. P. 1 (emphasis added). So cases construing district courts' powers under Rule 60(b)(6) have no direct bearing on the appropriate role for the courts of appeals. *See Pauley*, 321 F.3d at 581 n.1 (noting that the "[c]ircuits are split on the question whether *a district court* may grant Rule 60(b) relief *sua sponte*") (emphasis added).

That question – namely, whether the district court could have decided on its own motion to vacate or modify the 1988 consent judgment – was neither presented to nor decided by either court below. More fundamentally, the conflict among the circuits that petitioners identify goes to whether district courts have the *power* to grant Rule 60(b) relief *sua sponte*. The cases cited by petitioners all involve challenges to district courts' decisions to exercise that power. None of them says anything at all to suggest that district courts have any *obligation* to revisit existing decrees *sua sponte* – the claim petitioners are making here.

Finally, the court of appeals expressly declined to address whether the intervening decisions of this Court in *Holder v. Hall*, 512 U.S. 874 (1994), and the Eleventh Circuit in *Nipper v. Smith*, 39 F.3d 1494 (1994) (en banc), *cert. denied*, 514 U.S. 1083 (1995), would justify or require modifying the 1998 consent decree. *See* Pet. App. 3a n.2. On remand, the district court, "[u]pon consideration of the [court of appeals'] opinion," BIO App. 10a, decided to reinstate the 1998 decree. Thus, even if this Court were to resolve the conflict identified by petitioners in petitioners' favor, it would have no effect on this case: the courts below have already declined to exercise the equitable power petitioners claim they possess.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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May 23, 2008

APPENDIX

[April 3, 2008, Judgment of the District Court]

IN THE DISTRICT COURT OF THE UNITED STATES OF THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JOHN DILLARD, et al.,)
)
Plaintiffs,)
)
ROBERT R. BINION and)
JOHN WRIGHT,)
)
Plaintiff-Intervenors,)
) CIVIL ACTION NO.
v.) 2:87-cv1179-MHT
) (WO)
CHILTON COUNTY)
COMMISSION, et al.,)
)
Defendants.)

JUDGMENT

In accordance with the opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) The joint motion to amend consent decree (Doc. No. 215) is granted.

(2) The following proviso in the 1988 consent decree is deleted:

> "provided, however, that the procedures used by the commission for that purpose shall ensure that, if a black citizen is elected to the

> county commission, he or she shall be offered the opportunity to serve a term as chair of not less that [sic] six months duration during each four year term of office. If more than one black citizen is elected to the commission, the proviso herein shall only require that one six month term as chair be guaranteed."

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

DONE, this the 3rd day of April, 2008.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

[April 3, 2008, Opinion of the District Court]

IN THE DISTRICT COURT OF THE UNITED STATES OF THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JOHN DILLARD, et al.,)
)
Plaintiffs,)
)
ROBERT R. BINION and)
JOHN WRIGHT,)
)
Plaintiff-Intervenors,)
)
v.)
)
CHILTON COUNTY)
COMMISSION, et al.,)
)
Defendants.)

CIVIL ACTION NO.
2:87-cv1179-MHT
(WO)

OPINION

This matter is before the court on the question of whether it should give final approval to the modification of the consent decree approved by this court on June 23, 1988 (Doc. Nos. 46 and 47), *Dillard v. Chilton County Bd. of Educ.,* 699 F.Supp. 870 (M.D. Ala. 1988), *aff'd, Dillard v. Chilton County Comm'n,* 868 F.2d 1274 (11th Cir. 1989) (table), and which provides for seven Chilton County Commissioners to be elected by the voters of the county at large using cumulative voting rules. The question is presented in a joint motion filed by plaintiffs John Dillard, et al., plaintiffs-intervenors Robert R. Binion and John Wright, and defendant Chilton County Commission, seeking the court's approval to strike the following proviso from ¶ 4 of the consent decree:

> "provided, however, that the procedures used by the commission for that purpose shall ensure that, if a black citizen is elected to the county commission, he or she shall be offered the opportunity to serve a term as chair of not less that [sic] six months duration during each four year term of office. If more than one black citizen is elected to the commission, the proviso herein shall only require that one six month term as chair be guaranteed."

For the reasons that follow, the court is of the opinion that the modification should be approved and the joint motion granted.

I. BACKGROUND

The motion to amend the consent decree is joined by all parties to this action. The claims of Gilbert Green and Calvin Jones, Jr., who were allowed to intervene in 2003, were dismissed by order entered on December 10, 2007, pursuant to a mandate of the Eleventh Circuit Court of Appeals. *Dillard v. Chilton County Comm'n,* 495 F.3d 1324 (11th Cir. 2007). Green and Jones have filed a petition for writ of certiorari. *Gilbert Green and Calvin Jones, Jr., v. Chilton County Comm'n,* No. 07-1124 (U.S.).

The consent decree in this action is the last of the 180 court-ordered election plans still active in the longstanding set of *Dillard* cases, which began with

Dillard v. Crenshaw County, 640 F.Supp. 1347 (M.D. Ala. 1986), and which eventually involved the governing bodies in 192 local jurisdictions in Alabama. By passing Act 2006-252, now codified at 1975 Ala. Code § 11-80-12, the Alabama Legislature adopted under state law all court-ordered election plans with respect to which there is no pending litigation challenging the plan. Act 2007-488 incorporated Act 2006-252 in an even broader statutory provision, now codified at 1975 Ala. Code § 11-3-1(c). Section 11-3-1(c), as amended by Act 2007-488, provides:

> "Unless otherwise provided by local law, *by court order,* or governed by Section 11-80-12, and as otherwise provided in subsection (d), there shall be in every county a county commission, composed of the judge of probate, who shall serve as chairman, and four commissioners, who shall be elected at the time prescribed by law and shall hold office for four years until their successors are elected and qualified."

(Emphasis added.) Section 11-80-12, provides:

> "Notwithstanding any other provision of law to the contrary, any board of education, county commission, or municipal governing body whose currently serving members have been elected by a method of election and a specific number of seats prescribed by a federal court shall retain that manner of election and composition until such time as the method of election or number of seats is changed in accordance with general or local law. This section shall not apply in any

> county where a federal court has overturned the previous order concerning the manner of election and the number of members of a county commission and shall not apply in any county where there is currently pending litigation, or appeals relating thereto, challenging previous court orders or consent orders concerning the manner of elections or the number of members or districts of a county commission."

There is no provision in Alabama law, however, for the above quoted proviso in ¶ 4 of the 1988 consent decree in this action, nor could such a racial classification be enacted by the Legislature unless it was narrowly tailored to serve a compelling state interest.

II. NOTICE TO THE CLASS AND FAIRNESS HEARING

Before addressing the merits of approving the amendment to the consent decree, the court must ensure that all members of the plaintiff class of black voters have been informed of the proposed amendment and have had the opportunity to voice any objections. Fed.R.Civ.P. 23(e). By order entered March 6, 2008, the court gave preliminary approval to the proposed modification of the consent decree and approved a notice to the plaintiff class. The notice to the class provided that all written objections must be submitted to the clerk of the court no later than by March 25, 2008. The court further stated that all objections by class members must be timely submitted in writing to be considered by the court. A fairness hearing was scheduled for April 3, 2008.

Defendant Chilton County Commission has certified that the notice to the class was published, as ordered, once a week for two weeks in the Chilton County News. The court finds that this was adequate notice that satisfies Fed.R.Civ.P. 23(e)(1), and constitutional requirements of due process. A fairness hearing was conducted on April 3, 2008, at which no written or oral objections were received from members of the plaintiff class.

III. WHETHER THE MODIFICATION OF THE CONSENT DECREE IS FAIR, REASONABLE, AND ADEQUATE.

Because all parties to this action agree to the proposed modification of the consent decree, the standards this court must employ to determine whether the modification should be approved are governed by Fed.R.Civ.P. 23(e). *Reynolds v. Alabama Dept. of Transportation,* 261 F.Supp.2d 1331, 1345-51 (M.D. Ala.), *vacated on other grounds,* 265 F.Supp.2d 1289 (M.D. Ala. 2001). Thus, the issue here is whether the proposed modification is "fair, reasonable, and adequate." Fed.R.Civ.P. 23(e)(2). This court has previously set out the factors it will examine in deciding whether a settlement is fair, adequate, and reasonable. Those factors are as follows:

> "(1) the views of the class members; (2) the views of class counsel; (3) the substance and amount of opposition to the settlement; (4) the possible existence of collusion behind the settlement; (5) the state of the proceedings; (6) the likelihood of success at trial; (7) the complexity, expense and likely duration of

> the lawsuit; and (8) the range of possible recovery."

Allen v. Alabama State Bd. of Education, 190 F.R.D. 602, 607 (M.D. Ala. 2000) (citations omitted). All of the relevant factors are satisfied here. However, in approving the amendment to the consent decree, the court must "undertake an analysis of the facts and the law relevant to the proposed compromise" and "support [its] conclusions by memorandum opinion or otherwise in the record." *Cotton v. Hinton,* 559 F.2d 1326, 1330 (5th Cir. 1977).*

No objections were submitted to the court by members of the plaintiff class. Commissioner Bobby L. Agee, who is black, and other class members attended the fairness hearing and represented to the court that they favored striking the race-specific proviso from the consent decree.

The Supreme Court has provided guidance about the appropriateness of race-specific relief in a remedial decree:

> "In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the

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* In *Bonner v. Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

> impact of the relief on the rights of third parties."

United States v. Paradise, 480 U.S. 149, 171, 107 S. Ct. 1053, 94 L. Ed. 2d 203 (1987) (plurality opinion). Although the Supreme Court in *Paradise* was addressing remedies in an employment context, the general principles it enunciated are applicable here as well. Commissioner Agee and defendant Chilton County Commission presented evidence that the proviso had never been invoked and was not necessary. To the extent it appeared to be necessary when the consent decree was approved in 1988, 20 years is a sufficient duration for such a temporary race-specific proviso. The evidence now before the court shows that striking the proviso should have no adverse impact on the class of black voters.

Counsel for the plaintiff class, experienced voting rights lawyers, have stated their view that removing the proviso was in the best interests of the class. The consent decree has been in effect for 20 years, and striking the race-specific proviso will facilitate the final dismissal of this action. The public interest will be served by eliminating an unnecessary racial classification from the consent decree.

An appropriate judgment will be entered.

DONE, this the 3rd day of April, 2008.

/s/ Myron H. Thompson

UNITED STATES DISTRICT JUDGE

[December 10, 2007, Order of the District Court]

IN THE DISTRICT COURT OF THE UNITED STATES OF THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JOHN DILLARD, et al.,)
)
Plaintiffs,)
)
ROBERT R. BINION and)
JOHN WRIGHT,)
)
Plaintiff-Intervenors,)
) CIVIL ACTION NO.
v.) 2:87-cv1179-MHT
) (WO)
CHILTON COUNTY)
COMMISSION, et al.,)
)
Defendants.)

ORDER

Upon consideration of the opinion of the United States Court of Appeals for the Eleventh Circuit entered on August 20, 2007, *Dillard v. Chilton County Com'n,* 495 F.3d 1324 (11th Cir. 2007), wherein the orders and opinions of this court made and entered herein on August 14 and September 6 and 21, 2006 (Doc. Nos. 170, 171, 182, 194, & 195), *Dillard v. Chilton County Com'n,* 447 F. Supp. 2d 1273 (M.D. Ala. 2006), 447 F. Supp. 2d 1280 (M.D. Ala. 2006), 452 F. Supp. 2d 1193 (M.D. Ala. 2006), were vacated; and the mandate for the United States

Court of Appeals for the Eleventh Circuit issued on December 6, 2007, and received in the office of the clerk of this court on December 6, 2007 (Doc. No. 206), it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) The orders and opinions entered on August 14 and September 6 and 21, 2006 (Doc. Nos. 170, 171, 182, 194 & 195), *Dillard v. Chilton County Com'n,* 447 F. Supp. 2d 1273 (M.D. Ala. 2006), 447 F.Supp. 2d 1280 (M.D. Ala. 2006), 452 F. Supp. 2d 1193 (M.D. Ala. 2006), are vacated.

(2) The claims set forth in the complaint-in-intervention (Doc. No. 64) filed by intervenors Gilbert Green and Calvin Jones, Jr. are dismissed without prejudice for lack of standing.

(3) The previously vacated remedial orders and judgments, including the orders and consent decree entered on June 23, 1988 (Doc. Nos. 46 & 47), that restructured the Chilton County Commission, including establishing a 'cumulative voting scheme' for the commission, *Dillard v. Chilton County Bd. of Educ,* 699 F. Supp. 870 (M.D. Ala. 1988), *aff'd, Dillard v. Chilton Cty. Comm'n,* 868 F.2d 1274 (11th Cir. 1989) (table), are reinstated.

DONE, this 10th day of December, 2007

/s/ Myron H. Thompson

UNITED STATES DISTRICT JUDGE

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③

FILED
MAY 30 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1124

In The
Supreme Court of the United States

GILBERT GREEN and CALVIN JONES, Jr.

Petitioners,

v.

JOHN DILLARD,

v.

CHILTON COUNTY COMMISSION,
ROBERT M. MARTIN, PROBATE JUDGE

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Eleventh Circuit

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TABLE OF CONTENTS

Page
TABLE OF CONTENTS. i

APPENDIX. ii

TABLE OF AUTHORITIES. iii

REPLY 1

I. Despite Respondents' Recent Deletion of the 1988 Decree's Racial Classification, the Petition is Not Moot.. 1
  A. Respondents' Fall Short of Proving Mootness.. 2
  B. The 1988 Decree Has A Collateral, Continuing Effect Under The Voting Rights Act.. 6

II. Petitioners Have Standing.. 7

III. The Eleventh Circuit Was Not Barred By Article III From Affirming the District Court's Decision to End the 1988 Decree.. 8
  A. The Conflict with Seventh Circuit Precedent Is Not Avoided By Respondents... 8
  B. The Split in the Circuits on the Rule 60(b) Power of the District Court Is Material.. 9

CONCLUSION. 12

APPENDIX

Jt. Motion to Amend Consent Order....... 105a-110a

Brief of Intervenor-Appellees/"Cross"-Appellants Gilbert Green and Calvin Jones, Jr., No. 06-14950AA and No. 06-15354 (11th Cir. Nov. 29, 2006)............ 111a-116a

TABLE OF AUTHORITIES

CASES: PAGE

Abrams v. Johnson, 521 U.S. 74 (1997). 6

ACORN v. Edgar,
56 F.3d 791 (7th Cir. 1996). 8, 9

Adarand Constructors, Inc. v. Slater,
528 U.S. 216 (2000) 1

Baker v. Carr,
369 U.S. 186 (1962). 7

Bartlett v. Strickland, 649 S.E.2d 364 (N.C. 2007), *cert. granted*, 76 U.S.L.W. 3490 (U.S. Mar. 17, 2008) (No. 07-679). 11, 12

Bunton v. Patterson,
393 U.S. 544 (1969). 7

Dillard v. Baldwin County Comm'n,
376 F.3d 1260 (11th Cir. 2004). 11

Firefighters Local Union No. 1784 v. Stotts,
467 U.S. 561 (1984).. 1

Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc., 528 U.S. 167 (2000). 2

Holder v. Hall, 512 U.S. 874 (1994).. 10

Lance v. Coffman,

127 S.Ct. 1194 (2007).. 7

McDaniel v. Sanchez,
452 U.S. 130 (1981).. 6

Northeastern Florida Chapter v. City of Jacksonville,
508 U.S. 656 (1993). 2

Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1, 127 S.Ct. 2738 (2007).. 2

Reno v. Bossier Parish Sch. Bd.,
528 U.S. 320 (2000). 6

Riley v. Plump, 2008 WL 1928261 (M.D. Ala. Jan. 22, 2008), *app. for stay granted*, 76 U.S.L.W. 3567 (U.S. Apr. 18, 2008) (No. 07A841). 5

United States v. W.T. Grant Co.,
345 U.S. 629 (1953). 4

STATUTES:

Ala. Act. No. 2006-252. 4
Ala. Act. No. 2007-4488. 5
Ala. Code § 11-80-12. 4
Voting Rights Act of 1965, § 5,
42 U.S.C. § 1973. . . . . *passim*

RULE:

Fed. R. Civ. P. 60(b)(5). 10

Fed. R. Civ. P. 31(c). 9

REPLY

Petitioners Green and Jones (collectively "Petitioners") respectfully submit their reply to Respondents' Brief in Opposition to the Petition for Writ of Certiorari ("BIO").

I. Despite Respondents' Recent Deletion of the 1988 Decree's Racial Classification, the Petition is Not Moot.

The questions presented in the Petition remain properly before this Court. Respondents are required to establish that the "allegedly wrongful behavior could not reasonably be expected to recur." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000). Their last minute revision of the 1988 Decree fails to carry this burden. The Eleventh Circuit order reinstating the 1988 decree remains in place. There is no concession from Respondents that the reinstatement is erroneous. Under similar circumstances, this Court declined to find a case moot. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 568-69 (1984) (court-ordered race-based layoffs halted pending appeal). Finally, because this Petition concerns voting in a "covered" jurisdiction, the challenged racial provision remains in effect until approval is given under § 5 of the Voting Rights Act.

A. Respondents' Fall Short of Proving Mootness.

"[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Northeastern Florida Chapter v. City of Jacksonville,* 508 U.S. 656, 661-62 (1993); *see also Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1,* 127 S.Ct. 2738, 2751 (2007). Given the history of this case, neither the fact that the Respondents voluntarily caused the provision to be removed from the consent decree, nor their statement that it does not intend to resuscitate such language, satisfies their "heavy burden" of proving that it is "absolutely clear" that the conduct will not recur. *See Friends of Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.,* 528 U.S. 167, 189 (2000).

Respondents provide two arguments in support of their position that the offending behavior is unlikely to recur. First, Respondents state the provision was removed from the consent decree by operation of court order. BIO at 11. Second, respondents state, without proof, that the consent decree at issue is a "one-of-a-kind decree" and that Alabama law does not authorize taking race into account in the selection of a public official. BIO at 11-12. In light of the history of this case, these arguments are wholly unpersuasive.

Respondents moved the District Court to remove the racial quota from the 1988 decree only after the filing of this Petition. Prior to the threat of this Court's intervention, Respondents vigorously defended the requirement of a racial quota; yet they now adopt a posture that removal of the quota was completely voluntary. Petitioners respectfully request this Court weigh such a convenient confession against the twenty years of a pattern and practice, which necessitated the litigation that brings this question to bar.

In fact, Respondents insisted during the course of the case that there was no need for removal of the provision. *See* App. 55a at ¶ 8 ("the remedies agreed to in the 1988 Chilton County Commission consent decree . . . further the objectives of the Voting Rights Act and the Fourteenth and Fifteenth Amendments"), App. 56a at ¶ 10 ("the failure or refusal of the Chilton County Commission and the Alabama legislature to adopt the 1988 consent decree in state law is tainted with racially discriminatory intent"), and App. 56a at ¶ 14 ("the 1988 consent decree plan provides black citizens in Chilton County an equal opportunity to participate in the political process . . ."). In the district court, Respondent Chilton County admitted that the provision was illegal, but refused to take action to change the 1988 decree. App. 66a-67a; 91a, 76a (admitting allegation that ¶ 4 violates the Fifth Amendment and the Fourteenth Amendment).

Moreover, on appeal from the decision of the district court to vacate the decree, either Respondent could have easily excepted the chair selection provision and allowed the order to vacate the provision to stand. Instead, Dillard defended it and Chilton County remained silent. Accordingly, Respondents' argument to the District Court that the provision "was intended as a temporary remedial measure," app. at 107a, seems self-serving and inaccurate. *See United States v. W.T. Grant & Co.*, 345 U.S. 329, 634 (1953) (failure to terminate the conduct in question until after a suit was filed, despite years of attempts to persuade a party otherwise, as well as the parties' express refusal to concede that the actions at issue were illegal, may be persuasive proof that the conduct is likely to recur).

Respondents next contend that because "no provision in Alabama law [. . .] would authorize taking race into account in selecting the chair of a county commission, there is no possibility that such a provision will be reinstated." BIO at 11-12. This argument quite simply ignores the fact that there was no such statute in place preceding their implementation and defense of such a practice. Nevertheless, for the past twenty years Chilton County voters have been subjected to a voluntary agreement between the Respondents that required race be considered in the selection of the commission chair, and denied them their right to vote for that position. This agreement was blessed and enforceable by the contempt power of a federal district court in the name of the Voting Rights Act.

Petitioners also reject Respondents argument that the new State statutes operate as Respondents contend. *See* BIO at 11-12,18-19. Act No. 2006-252 is codified at Ala. Code § 11-80-12. It says explicitly that "where a federal court order has overturned the previous order concerning the manner of election and the number of members of a county commission," the section shall not apply. Further, the district court ruled while this Petition was pending, that § 11-80-12 does not incorporate the existing federal court order for the Chilton County Commission, as the law of the State of Alabama. App. 39a. This interpretation is correct.

In further support of their argument, Respondents cite Act No. 2007-488. This act exempts county commissions, which are governed as "provided by local law, by court order, or governed by Section 11-80-12" from a general requirement for the number of members and their terms of office. This statute cannot moot Petitioner Green's claims because it does not establish which of the different forms of the exemptions controls. Thus, the statute does not determine, as a matter of state law, that a federal court order controls the proper number of members of the county commission.

If Act No. 2007-488 does ratify the 1988 decree, as Respondents claim, then the court-established Chilton County local government embeds into state law the racial classification of the 1988 decree. It is most unlikely that the Alabama legislature meant to confer on courts, much less federal courts, the authority to adjust *prospectively* the make-up of local government. If that did happen here, then there is utterly no assurance that Respondents will not make another deal to impose even wider racial classification in local government.

Finally, Act No. 2007-488, and its application to Chilton County (with or without the deletion of the racial set aside on the chair position) has not been submitted for § 5 approval pursuant to the Voting Rights Act, 42 U.S.C. § 1973c. *See Riley v. Plump*, No. 07- 1460, Juris. Statement at 10 n.7 (May 21, 2008). To the extent it changes State law, this statute cannot be enforced as state law, until § 5 approval is obtained.

B. The 1988 Decree Has A Collateral, Continuing Effect Under The Voting Rights Act.

The case is not moot for yet another reason. Because the 1988 decree was the product of a local government's policy choice, it serves as a baseline under § 5 of the Voting Rights Act, despite being reflected in a federal court order. *See McDaniel v. Sanchez*, 452 U.S. 130 (1981). The 1988 decree therefore has continuing effect, and future changes in State policy will be measured against that "baseline." *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 327-28 (2000).

Thus, the district court order vacating the 1988 decree as illegal under federal law restored the 1951 Act: four commissioners from residency districts, and a probate judge chairman, elected at-large. That structure was in effect on the Voting Rights Act statutory baseline date of November 1964, *see* 42 U.S.C. § 1973c. The district court order also ended the different practice established by Chilton County in 1988, which would be due to be used as a baseline, if the change came at the initiative of the State. *See e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 96-97 (1997).

Respondents' last minute, limited revision of the Eleventh Circuit-restored 1988 decree at the request of Chilton County, requested after review was sought here cannot be administered, until it receives § 5 approval. The claim against the racial quota for the chair position therefore cannot be moot

II. Petitioners Have Standing.

Respondents do not dispute Petitioners' assertion that their exposure to a racial classification confers standing. Pet. at 12. They do not assert that *Lance v. Coffman*, 127 S.Ct. 1194 (2007), applies to the removal of an office from selection by citizen voters. Rather, Respondents imply that "dilution" of the aggregate voting strength of a voter in a racial group is the only basis for distinguishing a voter's standing from a mere generalized grievance of the *Lance* voter. BIO 15 (citing *Baker v. Carr*, 369 U.S. 186, 207-08 (1962).

This case is worthy of this Court's review to explain the difference between those *Lance* case voters, who lacked standing, and those voters in *Baker v. Carr*, and other cases cited, who possess standing. The Eleventh Circuit's discussion of standing sought to treat the claims about the racial set aside as if they involved only the rights of Commission members, or the general citizenry. Pet. App. 19a-20a n.9. Much more is at stake.

As this Court noted in *Bunton v. Patterson*, 393 U.S. 544, 555 (1969), a private party has standing to prevent denial of voting on account of race, including the change of an office from elected to appointed positions. The Eleventh Circuit was wrong to find otherwise.

III. The Eleventh Circuit Was Not Barred By Article III From Affirming the District Court's Decision to End the 1988 Decree.

A. The Conflict with Seventh Circuit Precedent Is Not Avoided By Respondents.

The crux of Respondents' argument is that *ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1996) is wrongly decided. Their efforts at finely parsed distinctions fail to avoid the essential difference between the Seventh Circuit's decision and the decision here. The Seventh Circuit's conception of appellate court power conflicts with the Eleventh Circuit's, and the respect required by Article III courts for local election structures is much more real than Respondents acknowledge. BIO at 21. The judicial remedy reinstated by the Eleventh Circuit opinion orders not only a racial classification, but also the creation of officials to govern Chilton County– the very equitable remedy condemned for Illinois *sua sponte* by the Seventh Circuit.

In both *ACORN* and the case at bar, the affected government "waived" the relief ultimately issued. *See ACORN*, 56 F.3d at 796-97. Both governments lost on, or admitted, liability in the district court. To be sure, the appeals come to the court via differently-positioned parties, but that does not change the essential point about the appellate court's remedial power. Despite the absence of an explicit request from the affected government, the

Seventh Circuit protected State electoral structures through its supervisory power. The Eleventh Circuit did not.

Respondents attempt to treat the State's appeal of the liability judgment in the *ACORN* case as the "functional" equivalent of a State request for relief. BIO at 22. The invocation of this "functional" approach cuts in Petitioners' favor. In the instant case, the Respondent local government accepted the judgment of the district court in favor of Green, and did not appeal. Consequently, as a "functional matter," Chilton County defended the district court judgment on appeal through Green. Certainly, there was no requirement that it file a brief to receive the benefit of the judgment. *See* Fed. R. App. P., Rule 31(c).

The essential difference between the Eleventh Circuit decision and the *ACORN* case is *not* that there was some Article III controversy properly before the Seventh Circuit about the federal judicial supervision of local election processes. In both cases, there was. This Court should resolve the conflict over whether and how an appellate court should respond to such silence from the local government.

B. The Split in the Circuits on the Rule 60(b) Power of the District Court Is Material.

The Eleventh Circuit decision faces another legal hurdle– its failure to accept the district court's decision on the alternate ground that Rule 60(b)(5) authorized the district court to grant relief, "without regard for whether the proper parties have requested it." Pet. 23. On that point, there is plainly a split in the circuit courts, as Respondents acknowledge. However, Respondents are wrong in saying the split does not matter here.

First, Respondents incorrectly characterize the question presented for resolving this split in authority as whether "the *Eleventh Circuit* could *sua sponte* vacate the 1988 . . . decree." *See* BIO at 23 (emphasis in original). Petitioners submit that the proper question is whether the Eleventh Circuit should have allowed the district court order vacating the 1988 decree to remain in place. That would be an alternate ground for affirmance because the district court could have vacated the decree on its own motion. In that respect, the potential absence of Article III standing for Green himself to obtain affirmative injunctive relief against a party is immaterial.

Second, Respondents inaccurately report that the question was not presented below. The relevant portion of Petitioners' brief to the Eleventh Circuit on this issue is attached. App. 111a. Petitioners also referred to Rule 60(b)(5), and its standards throughout their Complaint-in-Intervention. App. 80a, 86a-87a, 89a, 90a, 92a-93a.

Third, Respondents urge that the conflict in the circuits is immaterial because a ruling in Petitioner Green's favor on this question cannot help him. *See* BIO at 24. Were this Court to conclude that the Eleventh Circuit was wrong not to accept the district court's obedience to the teaching of *Holder v. Hall*, 512 U.S. 874 (1994) and its progeny, *see* Pet. at 20, it is inconceivable that the appellate court would conclude the 1988 decree *must* continue to have prospective operation.

Fourth, in addition to the remedy of creating local government officials being outside the scope of the equity power of federal courts, Dillard lacked standing to perpetuate a decree like the Chilton County 1988 decree. Blacks are not sufficiently numerous or geographically concentrated in Chilton County to suffer vote dilution as a racial group. Pet. at 6-7; *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870, 875-76 (M.D. Ala. 1988) (noting effect of small numbers on four person Commission structure). The Eleventh Circuit so ruled in another *Dillard* case, *Dillard v. Baldwin County Comm'n*, 376 F.3d 1260, 1267 (11th Cir. 2004). *But see*, Pet. App. 3a n.2.

Were there any doubt on that point, it could only arise from the possible outcome in *Bartlett v. Strickland*, No. 07-679, where the question presented is whether a vote dilution claim under § 2 of the Voting Rights Act can exist absent the ability of a minority group to comprise more than 50% of an election district. In Chilton County, it is not possible for a minority group to do so, and so there is no basis for Dillard to perpetuate the 1988 decree as a § 2 remedy. But the petition in the *Bartlett* case asserts a conflict on whether there can be vote dilution, or a remedy, under circumstances such as those which exist in Chilton County. Petitioners urge this Court to hold this Petition for resolution of the conceptually-connected review pending in *Bartlett v. Strickland*.

CONCLUSION

Based on the foregoing, Petitioners respectfully request that this Court issue a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

JOHN DILLARD, ET AL.,)
Plaintiffs,)
)
ROBERT R. BINION and)
JOHN)
WRIGHT,)
Plaintiff-Intervenors,) CIVIL ACTION NO.:
) 87-CV-1179-MHT
)
v.)
CHILTON COUNTY)
COMMISSION,)
)
Defendants,)

JOINT MOTION TO AMEND CONSENT DECREE

Plaintiffs John Dillard et al. and plaintiff-intervenors Robert R. Binion and John Wright (hereafter "plaintiffs"), and defendant Chilton County Commission, through undersigned counsel, move the Court, pursuant to Rule 60(b)(5), Fed.R.Civ.P., to amend the consent decree approved by this court June 23, 1988. As grounds for their motion, movants would show as follows:

1. Section 11-3-1(c), Code of Alabama, as amended by Act 2007-488. provides:

> Unless otherwise provided by local law, *by court order*, or governed by Section 11-80-12, and as otherwise provided in subsection (d), there shall be in every county a county commission, composed of the judge of probate, who shall serve as chairman, and four commissioners, who shall be elected at the time prescribed by law and shall hold office for four years until their successors are elected and qualified.

(Emphasis added.) Section 11-80-12, Code of Alabama, provides:

> Notwithstanding any other provision of law to the contrary, any board of education, county commission, or municipal governing body whose currently serving members have been elected by a method of election and a specific number of seats prescribed by a federal court shall retain that manner of election and composition until such time as the method of election or number of seats is changed in accordance with general or local law. This section shall not apply in any county where federal court has overturned the previous

> order concerning the manner of election and the number of members of a county commission and shall not apply in any county where there is currently pending litigation, or appeals relating thereto, challenging previous court orders or consent orders concerning the manner of elections or the number of members to districts of a county commission.

2. Alabama law thus provides authority for the number of seats and the method of electing the Chilton County Commission provided by the 1988 consent decree. But Alabama law does not provide specific authority for the provision in paragraph 4 of the 1988 consent decree requiring that a black person elected to the commission be given the opportunity to serve as chair. This proviso was intended to be a temporary measure to ensure equal opportunity for a commissioner who was the choice of black voters to serve as chair. It has never been invoked or exercised during the twenty years the consent decree has been in force and effect. The Parties agree that it is no longer equitable for the proviso

to have prospective application, and therefore agree that it should be stricken.

3. To ensure there is or will be state law authority for all provisions in the1988 consent decree and to facilitate final dismissal of this action, it is equitable and just to amend said decree by striking from paragraph 4 the following proviso:

> provided, however, that the procedures used by the commission for that purpose shall ensure that, if a black citizen is elected to the county commission, he or she shall be offered the opportunity to serve a term as chair of not less that [sic] six months duration during each four year tem of office. If more than one black citizen is elected to the commission, the proviso herein shall only require that one six month term as chair be guaranteed.

4. Undersigned counsel is authorized to represent that counsel for the defendant Chilton County Commission join in this motion.

WHEREFORE, the parties jointly request the Court, pursuant to its authority under Rule23(e), Fed.R.Civ.P., to provide notice to members of the class of the proposed amendment of the 1988 consent decree, thereafter, to amend the consent decree by striking the foregoing proviso from paragraph 4.

Respectfully submitted this 4th day of March 2008.

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No. 06-14950-AA
No. 06-15354-AA

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOHN DILLARD, *etc., et al.,*

Plaintiffs/Appellants/ "Cross"-Appellees,

ROBERT R. BINION and JOHN WRIGHT,

Plaintiff-Intervenors/Appellants/ "Cross"-Appellees,

GILBERT GREEN and CALVIN JONES, JR.,

Plaintiff-Intervenors/Appellees/ "Cross"-Appellants,

v.

**CHILTON COUNTY COMMISSION,
PROBATE JUDGE ROBERT M. MARTIN, *etc.***

Defendants/Appellees/
"Cross"-Appellees.

On Appeal from the United States District Court for the Middle District of Alabama, No. 2:87-1179-T

BRIEF OF INTERVENOR-APPELLEES/ "CROSS"-APPELLANTS GILBERT GREEN and CALVIN JONES, JR.

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* * * *

III. The District Court Was Obligated to Set Aside the 1988 Order by Green's Complaint, or Its Own Motion.

A.The District Court Satisfied the Standards of Rule 60(b)(5) in Relying on the Precedents of this Court Since the 1988 Order.

The district court did not fail to consider the standards of Rule 60(b), as claimed by Dillard. See DBW Br. at 34-37. As this Court explained, Rule 60(b)(5) authorizes relief when a prior judgment on which the decree is based has been reversed:

> A consent decree is a judgment, and thus subject to Rule 60(b), which provides in part that a party may obtain relief from a final judgment if "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Fed.R.Civ.P. 60(b)(5).

Johnson v. Florida, 348 F.3d 1334, 1341 (11th Cir. 2003). Under this standard, the district court's focus on the appellate precedents since the 1988 order is proper.

Here, not only did Green plead for relief under Rule 60(b)(5), but Green submitted an extensive Trial Brief and urged that the provisions of the 1988 order are no longer equitable in light of judicial rulings since 1988. (Doc. 150 at 18-35). Further, the transcript of oral argument on the written trial record in April 2005 made it clear that the district court understood it was operating under Rule 60(b). (Transcript (Apr. 26, 2006) at 23-26). The absence of a recital of Rule 60(b) hardly means that it was not the basis for relief.

Dillard complains that the district court did not apply the standards prescribed by *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), and show a change in controlling law. *See* DBW Br. at 36, 38-41. But the district court honored this Court's precedent, *Ensley Branch, NAACP v. Siebels*, 31 F.3d 1548, 1578-79 (11th Cir. 1994), which finds the principles of *Rufo* not to warrant such a showing when the challenge is from a non-signatory. Common sense and fairness to non-parties call for such a rule. *See id.* at 1578 (rule minimizes independent actions).

Dillard also urges that the district court not be affirmed on the alternate ground that, regardless of Green's standing, it was empowered to act on its own motion. *See* DBW Br.at 36-37. Dillard claims deference to the local legislative judgments counsel such an approach, and points to the absence of state or local government seeking vacation of the 1988 order. Actually, the district court needs the power to act on its own motion precisely because government officials sometimes prefer judicial supervision to supervision from their constituents. *See Ensley Branch, NAACP*, 31 F.3d at 1574; *United States v. City of Miami*, 2 F.3d 1497, 1506-07 (11th Cir. 1993). That power is particularly important if local officials and cosigners on their consent decrees insist on barring challenges from nonparties, or even if local officials feign indifference and allow others to delay action to comply with law.

Deference on this basis would be erroneous, as a matter of fact, too. In September 2003, the defendants admitted the allegations of the Complaint-in-Intervention filed by Green. (Doc. 75). In the Order on Pre-Trial Hearing, these local government officials requested that they not be subjected to conflicting orders from the court, but they do not deny Green's allegations. (Doc. 108 at 13). The current State legislative judgment favors a commission of four persons elected from single-member election districts, with the probate judge serving as chair *ex officio*. The 2003 act of the Alabama legislature had these provisions. Moreover, the 2006 legislature chose not to include Chilton County in a 2006 statute which ratified cumulative voting established by federal court orders, and not the subject of litigation.

Furthermore, in early 2004, the State of Alabama has advised that it believes the 1988 order should be vacated. Its posture in the Chilton County case, No. 87cv1179, has a tortured path. Originally, it was not a party. The State's position in early 2004 is set out in the Order on Pre-trial Hearing. (Doc. 108 at 13-14). In general, the State then viewed *Holder, Nipper* and *White* as likely barring change of size as a § 2 remedy. *Id.* at 14. At the direction of the court in late 2004, the State took more definite positions. It filed a Rule 60(b) motion, and sought to have the decree vacated. It asserted that the relief granted in 1988 should no longer have prospective effect, expressing more certainty about the effect of *Holder, Nipper* and *White*. The State also urged that the Alabama legislature's general intent to engage in racial discrimination is not the cause of any lack of political power for blacks, as a racial group, in Chilton County. Rather, the cause is their small population. *Id.* at 3 (citing *Johnson v. DeSoto County*, 204 F.3d 1335 (11th Cir. 2000), and *Dillard v. Baldwin County Commission*, 222 F. Supp. 2d 1283 (M.D. Ala. 2002)). At the oral argument on the written trial record in April 2005, all the parties agreed that the State was not a party to the Chilton County action. The district court deemed its Rule 60(b) motion moot, and noted that the State was merely "interested." *See* Tr. at 35-41.

* * * *

CERTIFICATE OF SERVICE

I certify that I have on this 29th day of November 2006, served a copy of the foregoing Brief of Intervenor-Appellees/"Cross"-Appellants Gilbert Green and Calvin Jones, Jr. on all counsel of record by United States Mail, postage prepaid and addressed as follows:

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